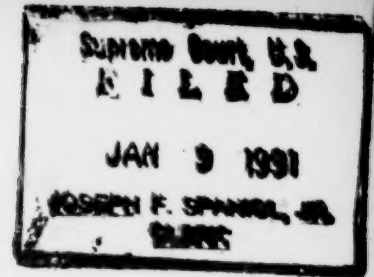


①
90-1092



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

LEAH LIZA MARKS

Petitioner

v

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN J. BOCK
(Counsel of Record)
26699 W. Twelve Mile Road,
Suite 200
Southfield, Michigan 48034-1578
(313) 352-5040

WANDA M. BRUSH
26699 W. Twelve Mile Road,
Suite 200
Southfield, Michigan 48034-1578
(313) 352-5040



QUESTION PRESENTED

1. Whether in a forfeiture action under 21 U.S.C. § 881(A)(7) and U.S.C. § 853(n)(6)(A) involving entireties property - where the Court has held that state property law governs the property rights of the parties and has further held that under the applicable state law the innocent spouse has an indivisible interest in the whole property held by the entireties and that the Government may properly acquire only the interest which the guilty spouse held as cotenant by the entireties -- the Government may be deemed a judgment creditor of the guilty spouse and given a lien against the entireties property so as to deny the innocent spouse the use of the whole where the state law provides that only joint creditors can incumber entireties property?

TABLE OF CONTENTS

Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Statement of Case	5
Reasons for Granting Writ	9
Appendix	A1

A. Opinion of the United States Court of Appeals for the Sixth Circuit dated August 8, 1990 A1

B. Opinion, Order and Judgment of the United States District Court for the Eastern District of Michigan, Southern Division, entered November 7, 1988 A58

C. Order Modifying Opinion, Order and Judgment of the United States District Court, Eastern District of Michigan, Southern Division, entered November 22, 1988 .. A72

D. Order of the United States Court of Appeals for the Sixth Circuit Denying Suggestion for Rehearing En Banc and Petition for Rehearing, entered October 11, 1990 A75

E. Judgment Pursuant to the Opinion of the United States Court of Appeals for the Sixth Circuit, dated October 24, 1990 A77

TABLE OF AUTHORITIES

CASES

<i>Backowski v. Solecki</i> , 112 Mich. App. 401, 412 (1982), 51 Am. Jur.2d. Lis Pendens, § 1, p. 949.....	25
<i>Battjes Fuel & Building Material Company v. Milanowski</i> , 236 Mich. 622, 624, (1926).....	17
<i>In re Sells Estate</i> , 96 Mich. App. 373, 292 N.W. 2d 147 (1980).....	17
<i>In re Ved Elva</i> , 260 F.Supp. 978 (1966).....	19
<i>Long v. Earle</i> , 277 Mich. 505, 517 (1936).....	17, 28
<i>Matter of Grosslight</i> , 757 F2d 773, 775 (1985).....	18
<i>McCintic Marshall Co. v Ford Motor Co.</i> , 254 Mich. 305, 316 (1931).....	20, 21
<i>Muskegon Lumber & Fuel Company v. Johnson</i> , 338 Mich. 655 (1954).....	27
<i>Pettengill v. United States</i> , 205 F.Supp. 10,13 (D Vt. 1962).....	19
<i>Rogers v. Rogers</i> , 136 Mich. App. 125, 134, 356 N.W.2d 288, 292-293 (1984).....	27, 29
<i>Schelowski v. Pawlowski</i> , 168 Mich. 664, 667, (1912).....	21, 29
<i>Turner v. Davidson</i> , 277 Mich. 459, 462 (1924).....	18

<i>Tyler v. Birmingham Realty Co.,</i> 207 Ala. 210.....	20
<i>United States v. American National Bank of Jacksonville, 255 F.2d 504-507</i> (5th Cir), cert denied, 358 U.S. 835 (1958).....	19
<i>United States v. Certain Real Property Located at 2525 Leroy Lane, West Bloomfield, Michigan and Leah Liza Marks, 910 F.2d 343 (6th Cir. 1990).....</i>	1
<i>United States v. One Single Family Residence, 894 F.2d 1511</i> (11th Cir. 1990)..	3, 9, 12, 14, 22, 24, 32
<i>United States v. United States Coin & Currency, 401 U.S. 715, 721-22, 91 S.Ct. 1041, 1044-45, 28 L.Ed.2d 434 (1971)....</i>	31

STATUTES

21 U.S.C. § 846	5
21 U.S.C. § 853	3
21 U.S.C. § 853(a)(2)	5
21 U.S.C. § 853(n)(6)(A).....	3, 8 , 10, 27
21 U.S.C. § 881	3
21 U.S.C. § 881(a)	30
21 U.S.C. § 881(a)(7)... ..	3, 4, 6, 8, 10, 14, 27, 30, 31, 32
21 U.S.C. § 881 (h).....	30
28 U.S.C. § 1254(1).....	2

M.C.L. 552.102;	
M.S.A. 25.132	17
M.C.L. 557.101;	
M.S.A. 26.201	16
M.C.L. 600.2701(2);	
M.S.A. 27A.2701(2)	25
M.C.L. 600.2725(1);	
M.S.A. 27A.2725(1)	25

TEXTBOOKS

51 Am. Jur. 2d, Lis Pendens,	
§ 1, P. 949.....	25

COURT RULES

Supreme Court Rule 10.1.....	3
------------------------------	---

MISCELLANEOUS

Black's Law Dictionary,	
Revised Fourth Ed.....	20

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

LEAH LIZA MARKS,

Petitioner,

v

UNITED STATES OF AMERICA

Respondent,

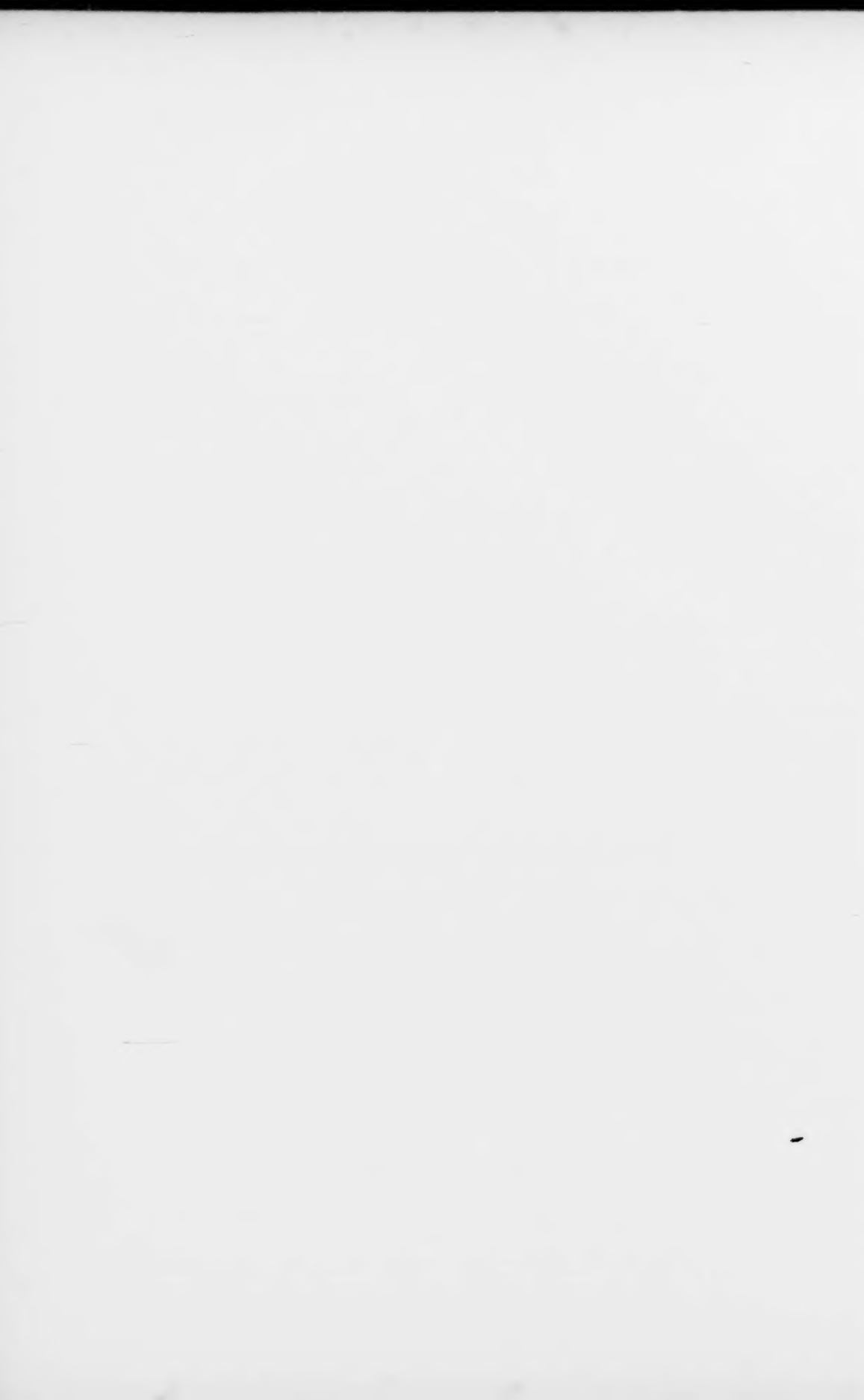
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

*To the Honorable William H. Rehnquist, Chief
Justice, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

Leah Liza Marks, the petitioner herein,
prays that a writ of certiorari issue to
review the opinion and judgment of the Sixth
Circuit Court of Appeals entered in the
above-entitled case on August 8, 1990.

OPINIONS BELOW

The opinion of the Sixth Circuit Court
of Appeals is reported at 910 F. 2d 343 (6th
Cir. 1990) and is reproduced in the



Appendix annexed to this Petition. (App. A1-A57) The opinion, order and judgment of the United States District Court, Eastern District of Michigan, Southern Division is reproduced in the Appendix annexed to this Petition. (App. A58-A71) The Order Modifying the Opinion, Order and Judgment of the United States District Court, Eastern District of Michigan, Southern Division, is also found in the Appendix. (App. A72-A74)

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals (App. A77-A78) was entered on August 8, 1990. A timely petition for rehearing was denied on October 11, 1990 (App. A75-A76) The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

The decision rendered by the Sixth Circuit Court of Appeals in this case is in conflict with (a) the decision of the Eleventh Circuit Court of Appeals in *United*



States v. One Single Family Residence, 894 F.2d 1511 (11th Cir. 1990) with respect to the interest obtained by the Government in a forfeiture action under 21 U.S.C. § 881(a)(7) in real property held by the entireties pursuant to state law; and (b) the decisions of the Supreme Court of the State of Michigan with respect to whether a judgment creditor of one spouse can incumber and lien entireties property. Supreme Court Rule 10.1.

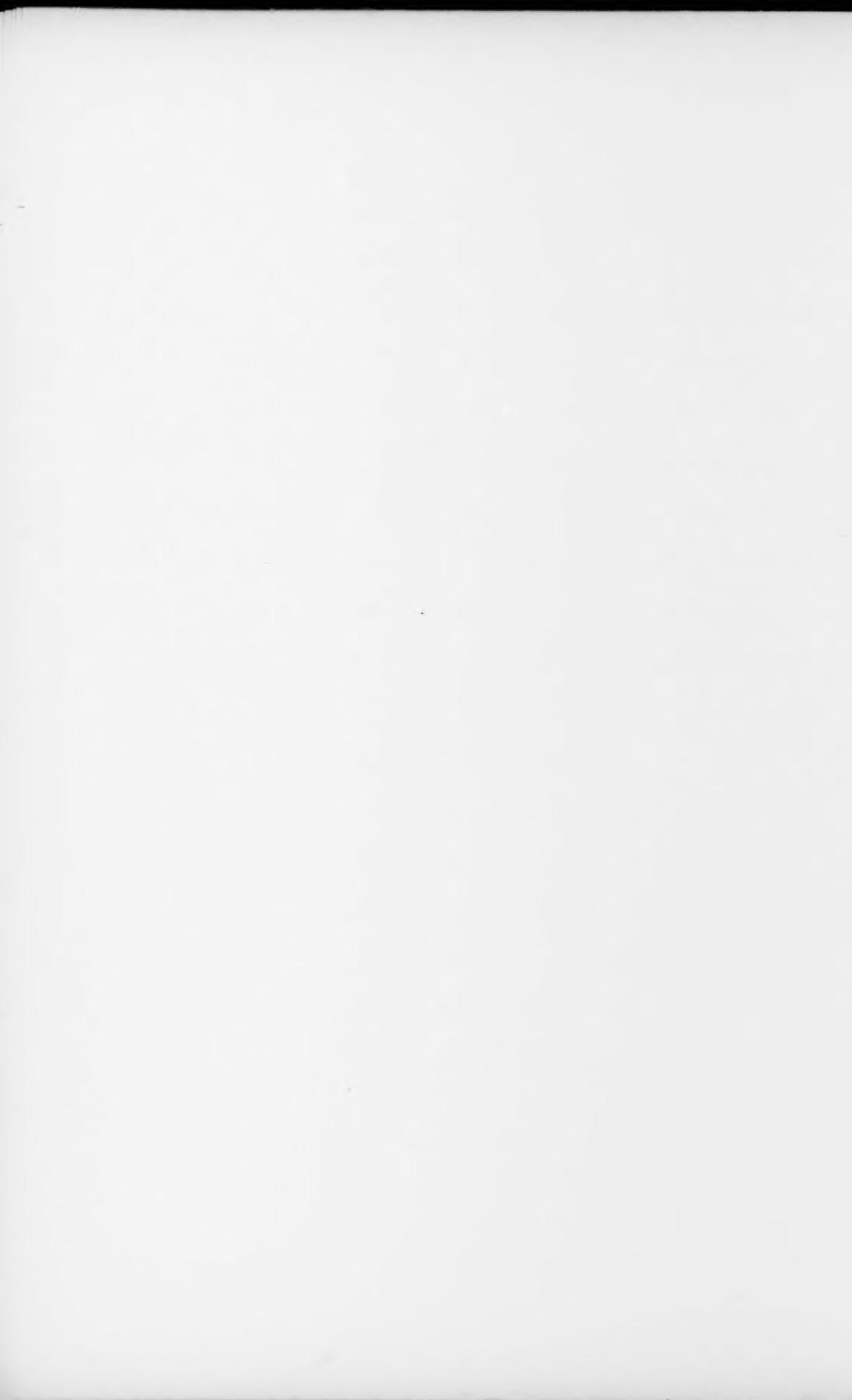
STATUTES INVOLVED

The federal statutes in question are Title 21 U.S.C. §§ 853 and 881.

Title 21 U.S.C. § 853(n)(6)(A) provides in pertinent part:

"(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that --

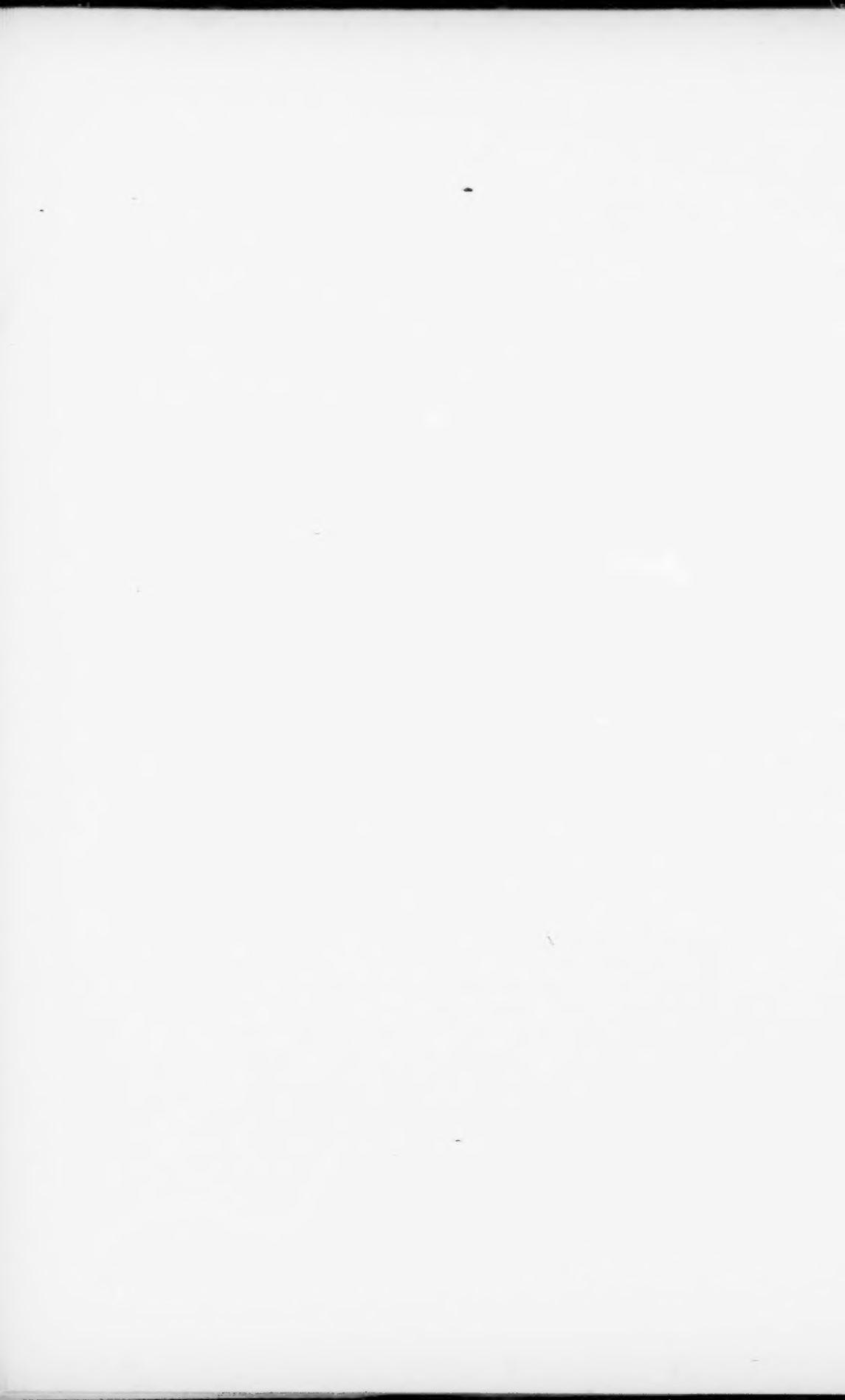
(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the



order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section . . . the court shall amend the order of forfeiture in accordance with its determination."

Title 21 U.S.C. § 881(a)(7) provides in pertinent part:

"All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or



consent of that owner."
[Emphasis supplied.]

STATEMENT OF THE CASE

On February 26, 1987, an indictment was returned in the Eastern District of Michigan against Mitchell Dennis Marks. The indictment charged Mitchell Marks with one count of conspiracy to possess with intent to distribute cocaine on or about December 15, 1985 through December 17, 1985 and one count of distribution of cocaine on or about December 15, 1985 in violation of the provisions of 21 U.S.C. § 846. The indictment also contained a forfeiture count pursuant to 21 U.S.C. § 853(a)(2), which alleged that Mr. Marks had an interest in real property located at 2525 Leroy Lane, West Bloomfield, Michigan which he used or intended to use to commit or facilitate the commission of a violation of the Controlled Substances Act. The real property in question was seized pursuant to a warrant



issued by a United States Magistrate on February 12, 1987.

Mr. Marks was convicted by a jury and a judgment order imposing sentence was filed on June 6, 1988. The judgment also ordered the forfeiture of Mr. Marks's interest in the real property. On July 15, 1988. Leah Liza Marks, petitioner, and wife of Mitchell Marks, filed a petition in the criminal case for a determination of her interest in the real property, as well as a claim to the property.

In the interim, on April 17, 1987, the Government filed a civil complaint for forfeiture pursuant to 21 U.S.C. § 881(a)(7) against the real property. On May 8, 1987, Leah Marks filed an answer to the complaint, and on May 15, 1987, she filed a claim of interest in the real property. The civil and criminal forfeiture proceedings were subsequently consolidated.

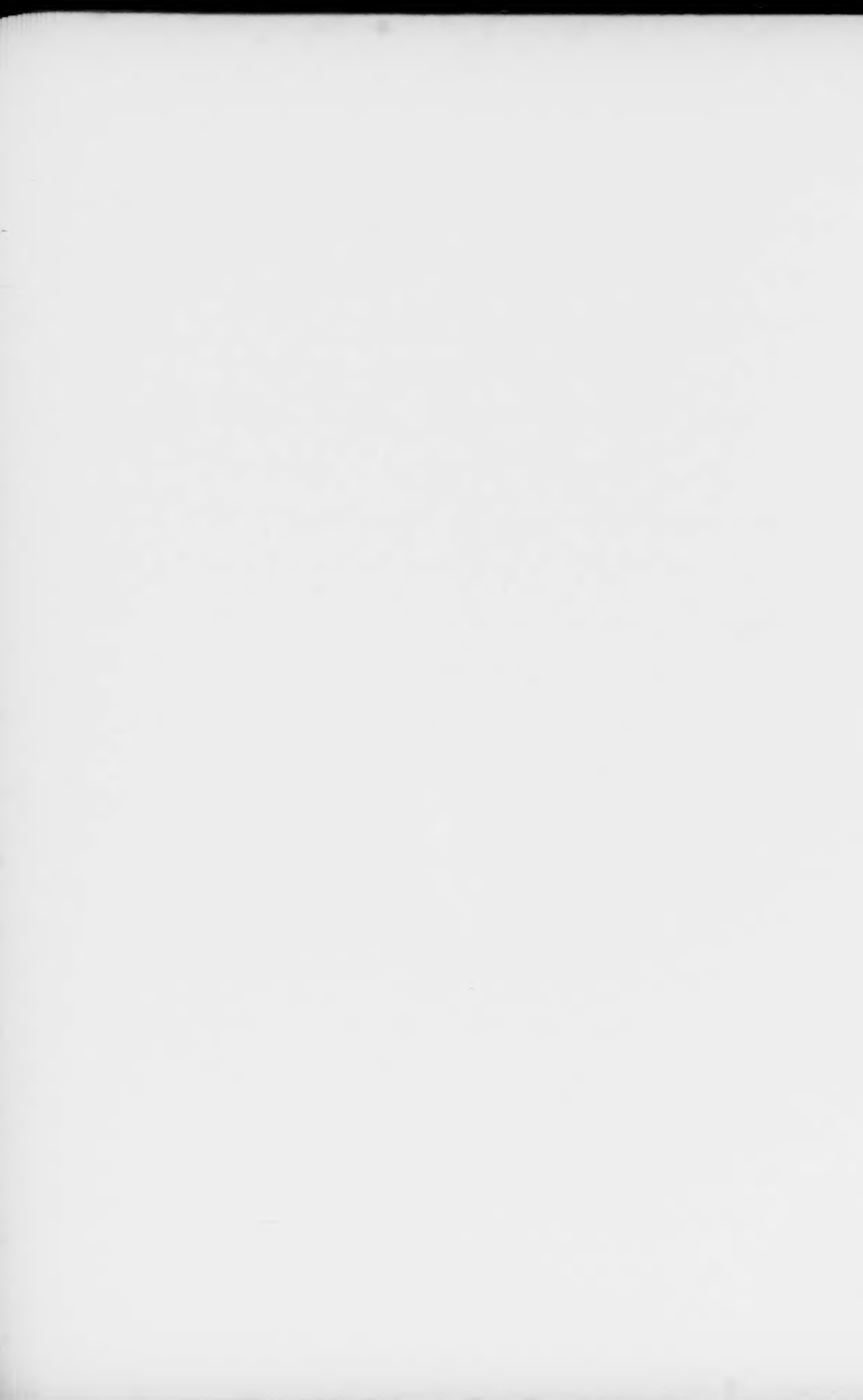


In the proceedings before the district court, the parties stipulated that the real property known as 2525 Leroy Lane was owned by Leah Marks with her husband, Mitchell Marks, as tenants by the entirety. (App. A4, A65) By agreement of the parties dated April 29, 1988, the real property was sold and the proceeds of the sale were designated as a substitute res in which the parties were deemed to have the same interest as they had in the real estate. (App. A4, A59) The Government and Leah Marks also entered into a stipulation of facts on November 2, 1988, in which the Government agreed that Leah Marks was an "innocent owner" within the meaning of the forfeiture provisions. (App. A4, A59)

By order entered on November 7, 1988, the district court awarded judgment to petitioner Leah Marks. The district court concluded that Leah Marks had a legal interest in the property "rather than" her

husband for purposes of 21 U.S.C. § 853 (n)(6)(A) (App. A66, A70), and was an innocent owner under 21 U.S.C. § 881(a)(7), so as to avoid forfeiture of the property. (App. A70) The district court further found that Leah Marks's entireties interest constituted an interest in the property as a whole, and that her innocent owner status operated to avoid forfeiture as to the entire property. (App. A70)

The Government appealed to the Sixth Circuit Court of Appeals. By order dated August 8, 1990, the Sixth Circuit vacated the judgment of the district court. The Sixth Circuit concluded that the "interest acquired by the Government is most analogous to the position occupied by a judgment creditor of one spouse under Michigan law" (App. A31, A32) and liened the property by establishing an escrow of the entireties fund of money:

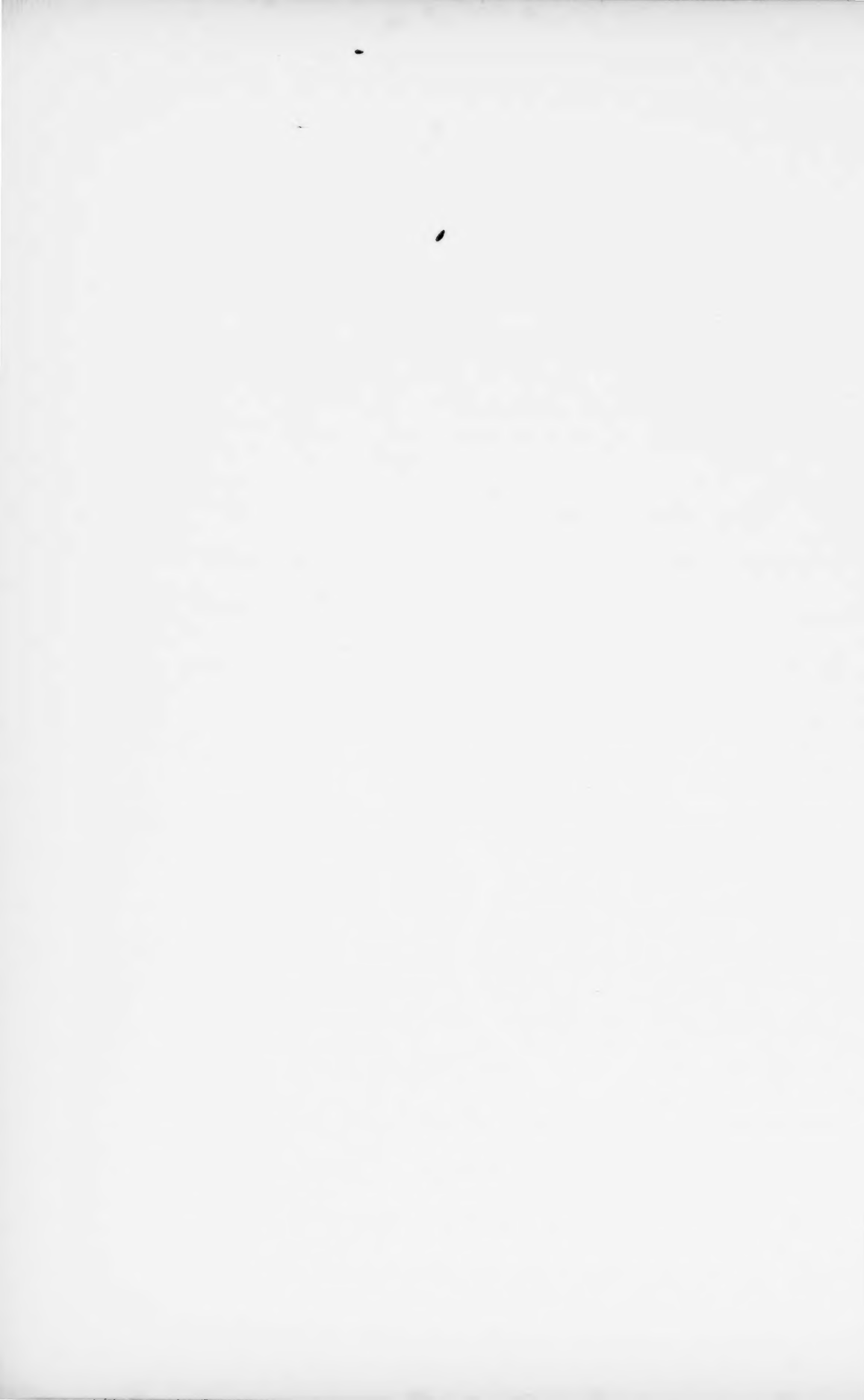


"Therefore, it becomes necessary in this case to hold the money in escrow, thereby establishing in effect a *lis pendens* in order to protect the Government's interests in anticipation of the occurrence of some event which may result in the vesting of the Government's interest in the proceeds of the property." (App. A35)

The Court remanded the case to the district court to determine the "precise scope of the Government's interest under Michigan law" (App. A35) and to determine "how to best manage and invest the fund in such a way as to protect the interests of both Mrs. Marks and the Government." (App. A37)

REASONS FOR GRANTING WRIT

The decision rendered by the Sixth Circuit Court of Appeals in this case is in conflict with (a) the decision of the Eleventh Circuit Court of Appeals in *United States v. One Single Family Residence*, 894 F.2d 1511 (11th Cir. 1990) with respect to the interest obtained by the Government in

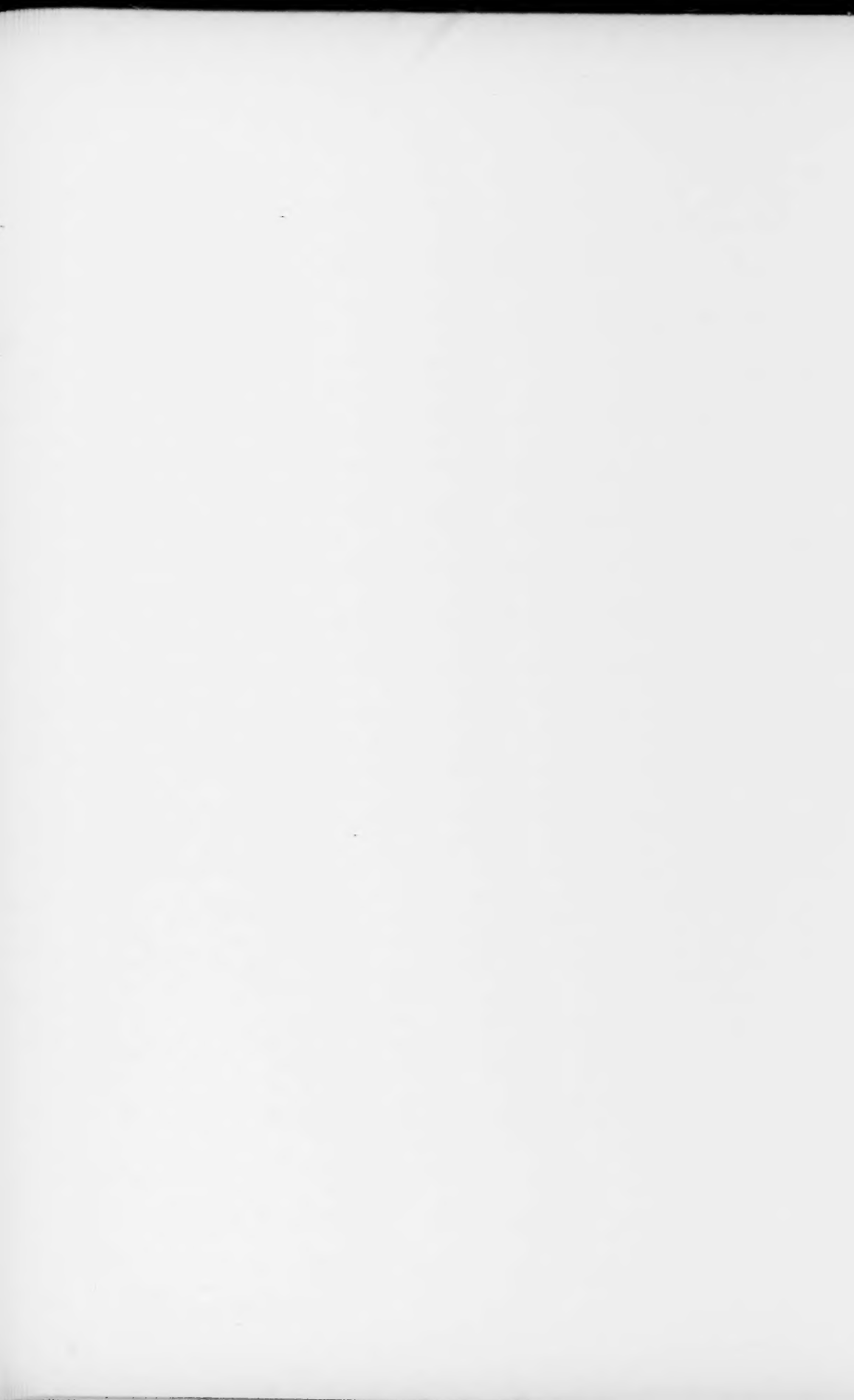


a forfeiture action under 21 U.S.C. § 881(a)(7) in real property held by the entireties pursuant to state law; and (b) the decisions of the Supreme Court of the State of Michigan with respect to whether a judgment creditor of one spouse can incumber and lien entireties property.

Under the criminal forfeiture statute, 21 U.S.C. § 853(n)(6)(A), "the court shall amend the order of forfeiture" if the petitioner has established by a preponderance of the evidence that:

"the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section"

The civil forfeiture statute, § 881 (a)(7), provides for the forfeiture to the



United States of:

"All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." [Emphasis supplied.]

Application of the statutes appear simple in the case at bar. Upon Mitchell Marks's violation of the Controlled Substances Act which involved the use of his home, the property became "subject to forfeiture to the United States" except for whatever interest Leah Marks, the innocent owner, had in the property. The conflict among the courts lies in defining the innocent spouse's interest in the property

which the government may not take.

Michigan and Florida are states which recognize tenancy by the entirety and both states define and treat tenancy by the entirety in the same manner:

In *United States v One Single Family Residence*, 894 F.2d 1511, 1514, 1515 (11th Cir. 1990), a case whose facts closely parallel those of the instant case, the Eleventh Circuit Court of Appeals stated with respect to entirety property:

"[E]ach spouse's interest comprises the whole or entirety of the property and not a divisible part; the estate is inseverable. [Citations omitted.] [N]either spouse can sell, forfeit or encumber any part of the estate without the consent of the other, nor can one spouse alone lease it or contract for its disposition. [Citation omitted.] Creditors cannot levy on entirety property to satisfy the debt of an individual spouse. [Citation omitted.]"

In its opinion in the instant case the Sixth Circuit stated the following with respect to entirety property: (App. A9, A10)



"Tenants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. [Citations omitted.] Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property." [Citation omitted.]

* * *

"A Michigan court in *Rogers v Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 292-293 (1984) described the entirety estate as follows:

"In Michigan real property law, tenancies by the entirety enjoy an ancient and hoary tradition In a true tenancy by the entirety, each spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entirety, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in



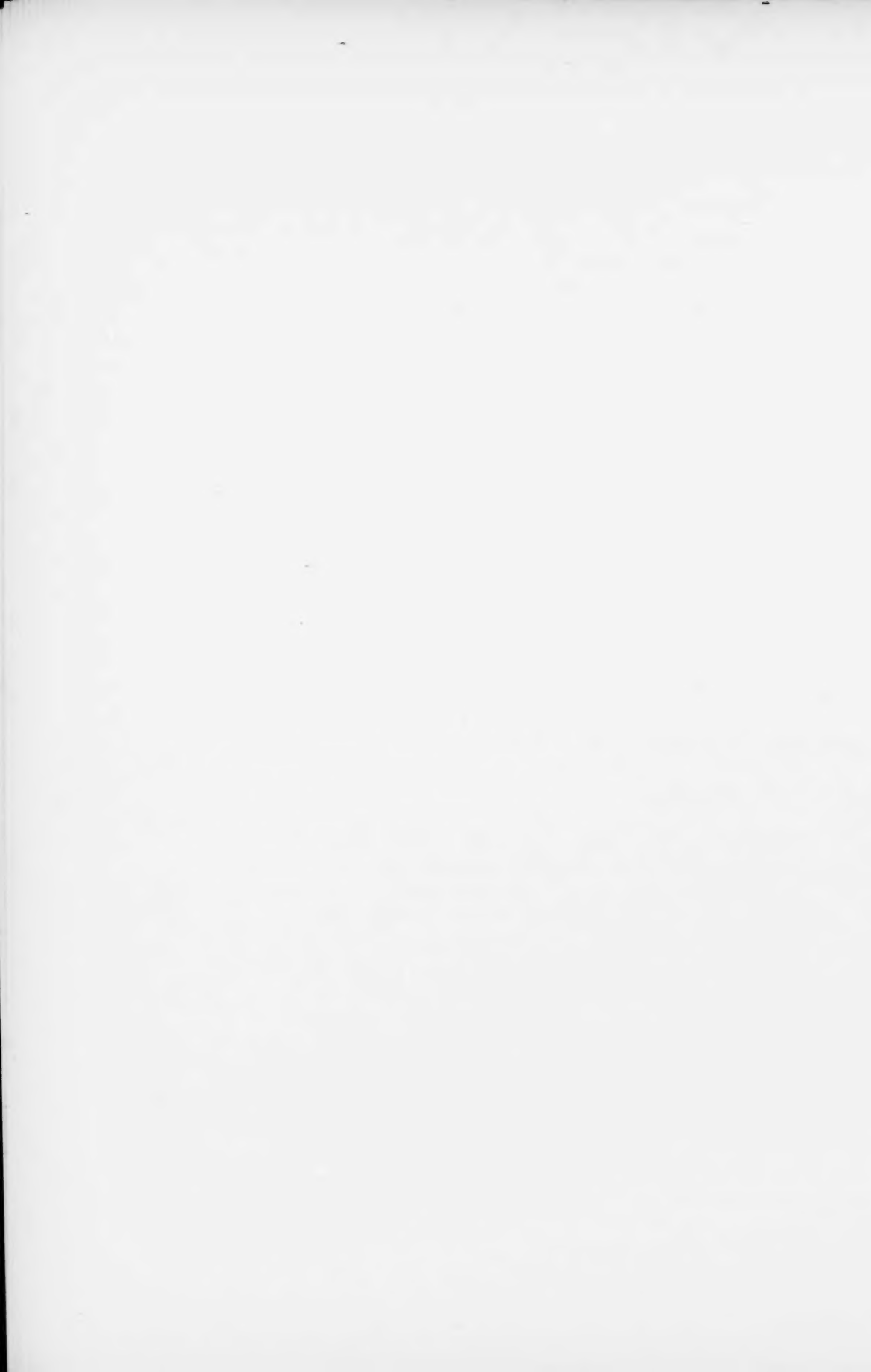
the entirety
property, and neither
has an interest in such
property which may be
conveyed, encumbered or
alienated."

In *United States v One Single Family Residence, supra*, the court considered the issue of what interest the Government acquires under 21 U.S.C. § 881(a)(7) in property used by its owner to facilitate a controlled substance transaction where the property is held by the entirety with an innocent spouse. The Eleventh Circuit at page 1512 held:

"Because we see no way for the government to obtain a meaningful share in an entirety property without forfeiting some part of the innocent spouse's interest, as long as the spouses remain married to each other and do nothing to terminate the entirety estate, we hold that none of the property can be forfeited to the United States."

The Sixth Circuit in its opinion in the case at bar held:

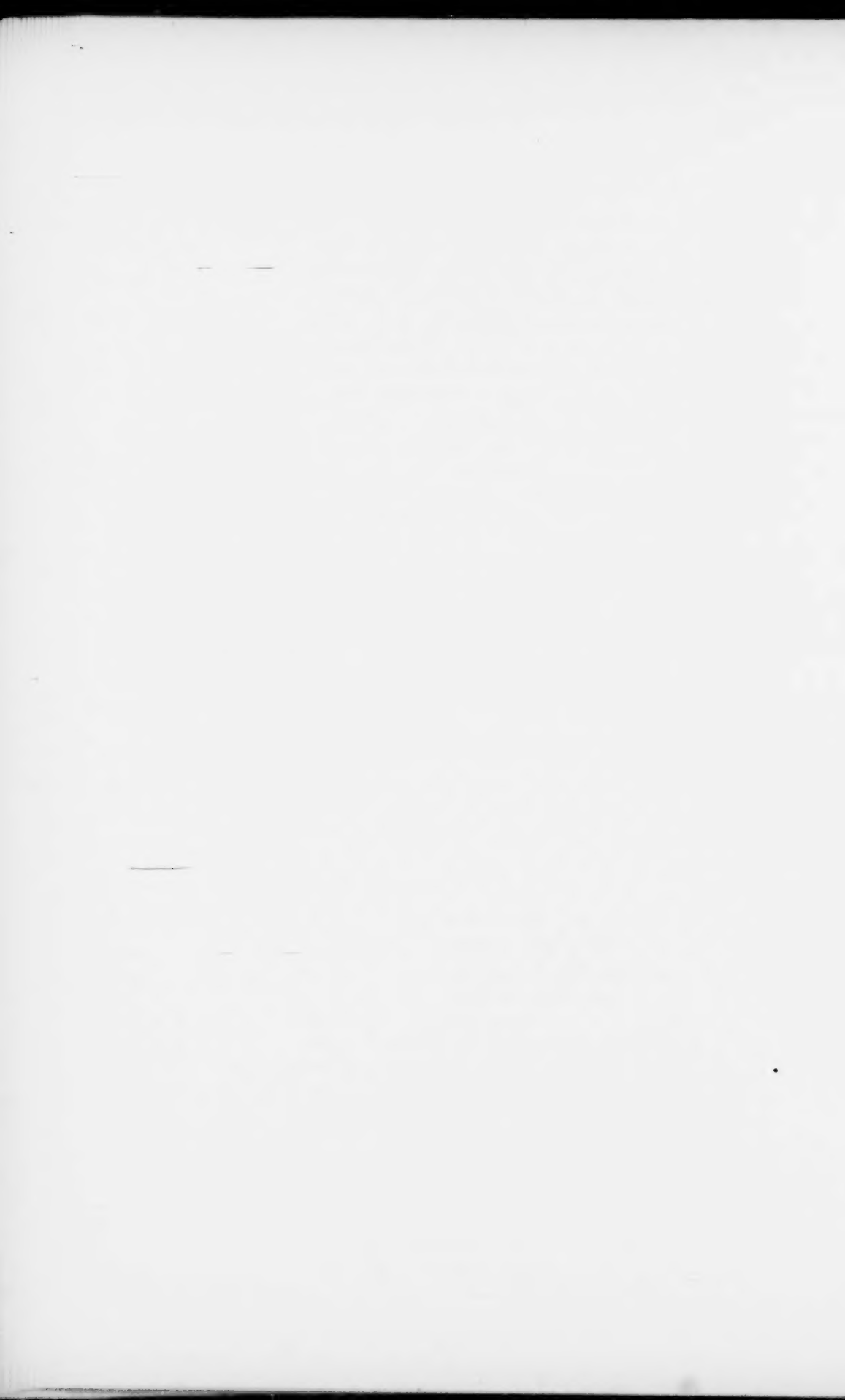
"By acquiring Mr. Marks's interest in the entirety



estate, the Government is precluded from obtaining Mr. Marks's interest in the property unless and until Mrs. Marks predeceases her husband or the entireties estate is otherwise terminated by dissolution of the marriage or joint conveyance. However, we do not agree with the district court's finding that the entire property vested in Mrs. Marks by reason of the forfeiture. Instead, we conclude that the interest acquired by the Government is most analogous to the position occupied by a judgment creditor of one spouse under Michigan law." (App. A31, A32)

The Sixth Circuit further stated:

"While we leave the determination of the precise scope of the Government's interest under Michigan law to the district court, we note some cases which may be instructive. As previously noted, the judgment creditors of one spouse may not levy against entireties property through a forced sale. [Citation omitted.] The creditors of the husband alone cannot reach the husband's share of proceeds from a foreclosure sale of the entireties real estate, [Citation omitted], or rents from property held by the entireties, [Citations omitted]. However, although Michigan law precludes a forced sale of property to enforce a judgment lien, we have



found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entirety estate. Each tenant by the entirety is entitled to share equally in the rents and profits derived from the entirety property. Thus, it may be that Mrs. Marks would be entitled to half of the interest from the fund of money." (App. A35, A36)

It is Petitioner's position that the Court's likening the Government to a judgment creditor and then imposing a lien against the entirety property is in direct conflict with well settled Michigan law. The Sixth Circuit's statement that "we have found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entirety estate"¹

¹ A tenancy by the entirety can terminate in a variety of ways. One spouse can convey his or her interest to the other. MCL § 557.101. Upon being divorced they become tenants in common, unless



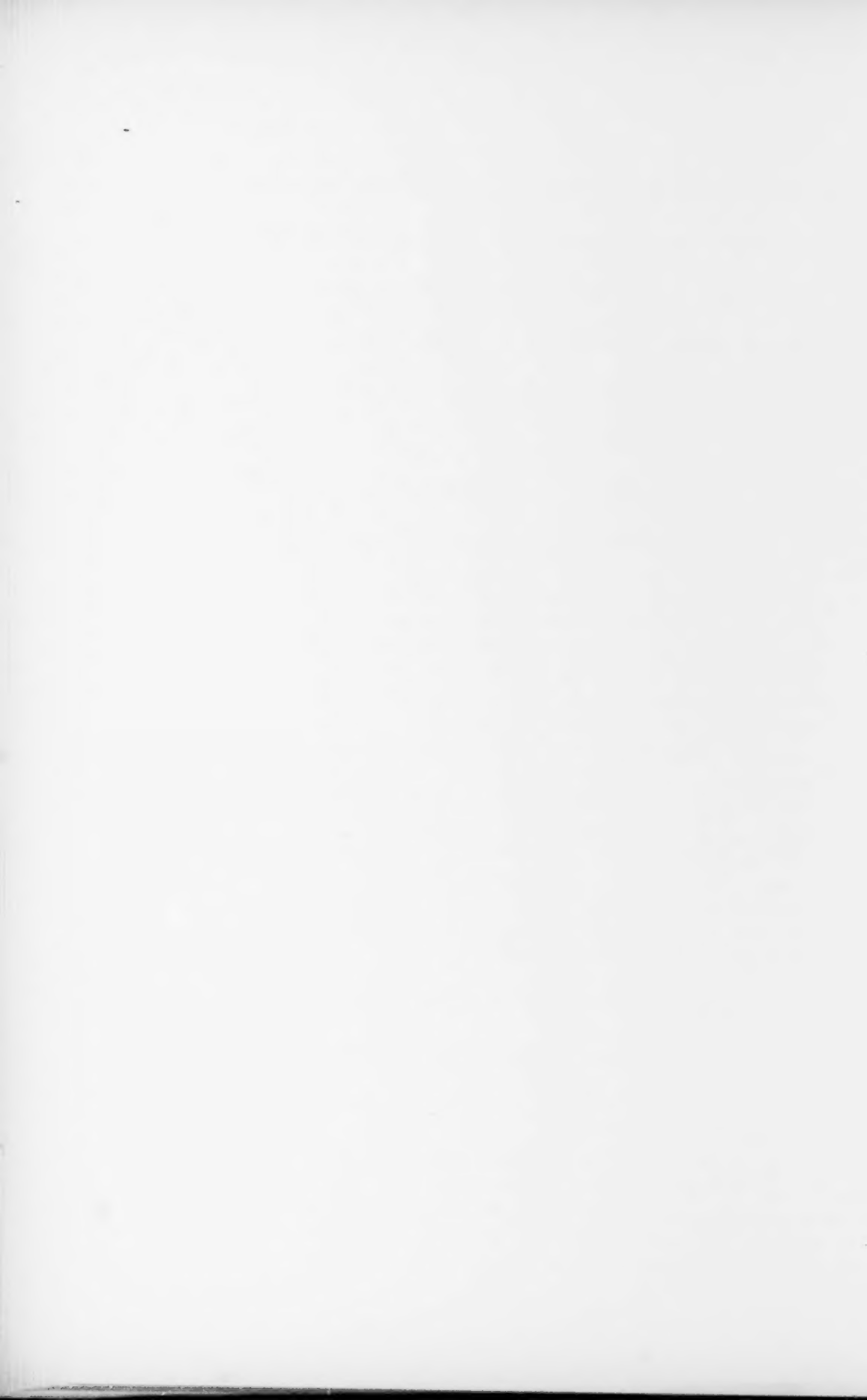
not only contradicts the cases cited in its own opinion with respect to entireties property, but Michigan case law is replete with cases prohibiting a judgment creditor of one spouse reaching any interest in entireties property:

In *Long v Earle*, 277 Mich 505, 517 (1936) the Michigan Supreme Court held:

"It is well settled under the law of this State that one tenant by the entirety has no interest separable from that of the other, has nothing to convey or mortgage or to which he alone can attach a lien. Neither can incumber real estate held as tenants by the entirety without the consent of the other. Each is vested with an entire title and as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title. (Emphasis added.)

In *Battjes Fuel & Building Material Company v Milanowski*, 236 Mich 622, 624,

ownership thereof is otherwise determined by the decree of divorce. MCL § 552.102. The death of a spouse destroys the entirety and vests ownership in the survivor. *In re Sells Estate*, 96 Mich. App. 373, 292 N.W. 2d 147 (1980).



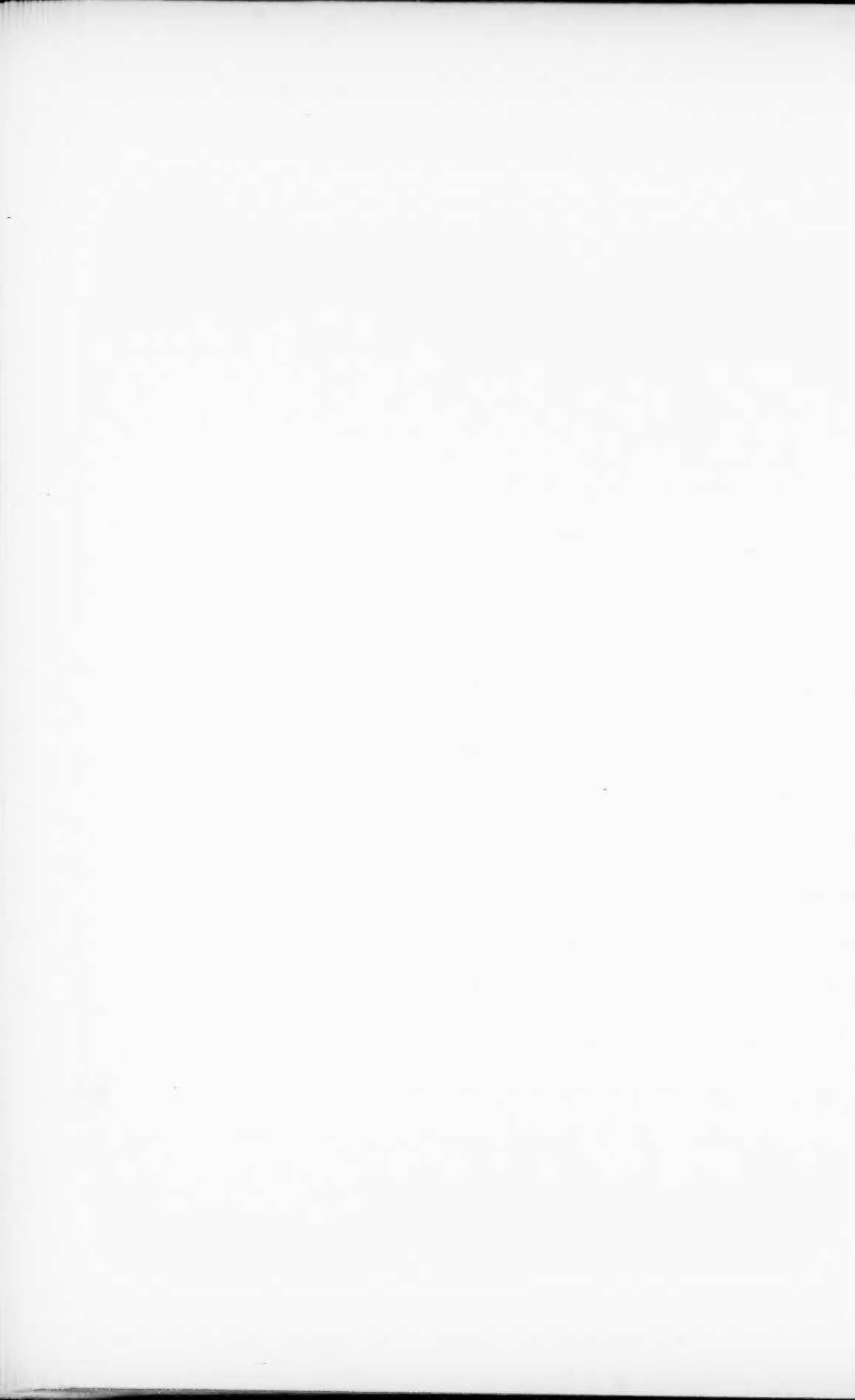
(1926) the court held that a husband's interest in entirety property cannot be reached by creditors of the husband alone:

"The husband could not, in any proceeding known to law, have judgment determining and separating his interest, and what he cannot have, his creditor, in his place, cannot secure."

In *Turner v Davidson*, 277 Mich 459, 462 (1924), the court stated, "The title so residing in husband and wife, it could not be involuntarily sold or incumbered for the debts of either."

Further, in the *Matter of Grosslight*, 757 F2d 773, 775 (1985) the Sixth Circuit held that no creditor of one spouse may levy against entirety property to satisfy the debt of that individual spouse.

Federal courts have recognized entirety property to be a fundamental incident of the marital relationship. For instance, entirety property has been shielded from creditors of the bankruptcy



estate of one spouse, *In re Ved Elva*, 260 F. Supp. 978 (1966), and the entireties holdings of tax lien debtors have been held inaccessible to the Government notwithstanding the strong federal policy which favors revenue collection. *United States v. American National Bank of Jacksonville*, 255 F.2d 504, 507 (5th Cir.), cert denied, 358 U.S. 835 (1958); *Pettengill v. United States*, 205 F. Supp. 10, 13 (D. Vt. 1962).

Notwithstanding the foregoing unambiguous, conclusive, explicit and well settled law in Michigan that creditors of one spouse cannot lien or in any way incumber entireties property, the Sixth Circuit Court has likened the Government to a Judgment Creditor of Mitchell Marks and ordered the money to be held in escrow "thereby establishing in effect a *lis pendens*." (App. A35) By its action the Sixth Circuit has not only undeniably



incumbered and liened the entireties property, but has denied Leah Marks any use of the property. Black's Law Dictionary, Revised Fourth Edition, page 908 defines "incumbrance" as a "claim, lien, charge or liability attached to and binding real property.

In addition, in *McClintic Marshall Co v. Ford Motor Co*, 254 Mich. 305, 316 (1931), the court held that in order to sustain a lien on real property, one of the following interests must be present:

Any interest in land which could be sold under execution.
McGreary v Osborne, 9 Cal 119.

"Any interest which the party could pass by mortgage.
Montandon & Co v Deas, 14 Ala 33.

"Any interest in land which is legally subject to mortgage.
Tyler v Birmingham Realty Co, 207 Ala 210.

"In short, any interest which the owner, part owner, or lessee may have, provided such interest is such that it can be assigned, transferred, mortgaged, or sold under execution. 40 CJ p 62."



Further, in *McClintic, supra*, page 323, the Court definitively stated:

"Liens in the abstract are non-existing. A lien that is unenforceable is a nullity. The right to enforce a lien by sale of the property to which it attaches is its essential characteristic."

In the instant action, the court in its opinion (App. A35) acknowledges the Government cannot enforce its so-called "lien" by the sale of the property. The lien, therefore, is a nullity and unenforceable.

In Michigan a judgment creditor does not automatically obtain a lien on any assets of the judgment debtor; further action has to be taken. The only way to reach any realty after taking a judgment is by levy. "No lien is acquired on real estate in Michigan under a judgment until actual levy of an execution." *Schelowski v. Pawlowski*, 168 Mich. 664, 667 (1912). Because the case law with respect to



entireties property cited by the Sixth Circuit in its opinion and noted above prohibits a creditor of one spouse from levying against entireties property, and no lien is acquired until actual levy, it is obvious no lien can attach to the entireties property which is the subject matter of this case.

The Sixth Circuit attempts to reconcile its decision in this case with the opinion of the Eleventh Circuit in *United States v One Single Family Residence, supra*, by making reference to a footnote in that case. The Sixth Circuit points out that the Eleventh Circuit, *Id* at 1516, in footnote 6 stated:

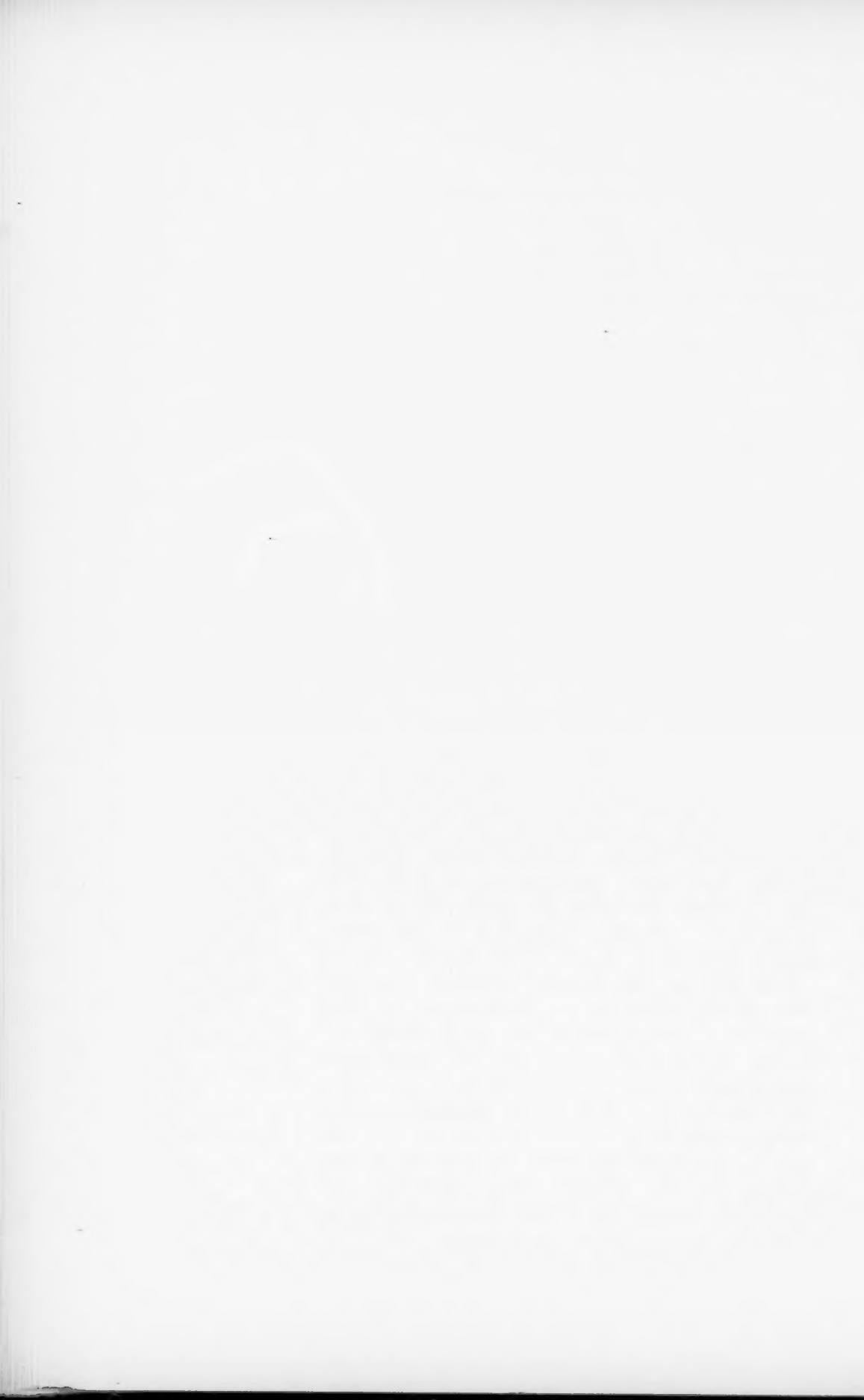
"Nothing would prevent the government from attempting to execute or levy on its interest should the entireties estate be altered by changes in circumstances or by court order. That is, we do not rule out the possibility that if the United States filed a *lis pendens* against the property, the government might acquire in a



later forfeiture proceeding Mr. Aguilera's interest in the property should he divorce his spouse, should Mrs. Aguilera predecease him, or should their interests be transmitted into some divisible form by their actions or by law. In such case, their interests would become distinct and separable so that forfeiture of his interest in the property would not affect her rights." (A33-A34)

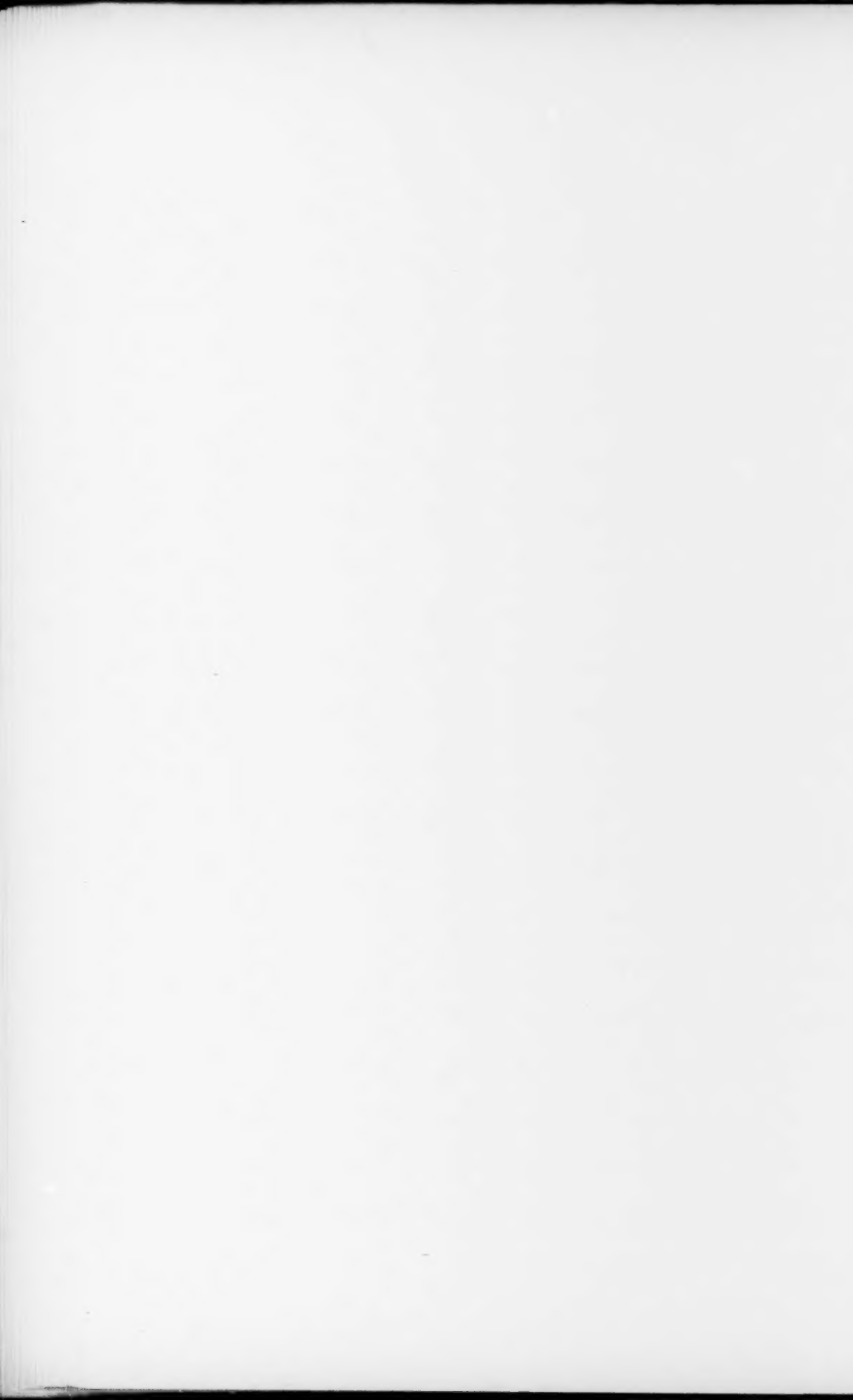
The Sixth Circuit then reasons (App. A34-A35):

"Our opinion in the present case is consistent with the conclusions reached by the Eleventh Circuit. The distinguishing feature in the case before the Eleventh Circuit is that the real property in question had not been sold, and therefore whatever future interest the Government might have in the property would be protected by the filing of a lis pendens. Here, however, the real property has been converted to a fund of money which could easily be dissipated. Therefore, it becomes necessary in this case to hold the money in escrow, thereby establishing in effect a lis pendens in order to protect the Government's interests in anticipation of the occurrence of some event which may result in the vesting of the Government's interest in the proceeds of the property."



Notwithstanding the Sixth Circuit's statement that its opinion in the present case is consistent with the conclusions reached by the Eleventh Circuit, the Sixth Circuit's opinion is in direct conflict with the conclusions reached by the Eleventh Circuit. The Eleventh Circuit found that none of the property could be forfeited to the United States and awarded the entire estate to the innocent spouse. The district court in the case at bar, arrived at the same conclusion as the Eleventh Circuit in *One Single Family Residence, supra*, yet the Sixth Circuit vacated the district court's judgment. Thus, the Sixth Circuit inconsistently expresses approval of the Eleventh Circuit's conclusions, yet reverses the district court's disposition.

Further, the Sixth Circuit's reasoning with respect to the foregoing footnote is erroneous. The Sixth Circuit has misinterpreted the footnote. That footnote



contemplates that in a later forfeiture proceeding, instituted after the termination of the entireties interest, nothing would prevent the Government from filing a lis pendens in that action and forfeiting the then separate interest of the guilty spouse.

This interpretation is consistent with the meaning of a lis pendens. A lis pendens is designed to warn persons who deal with property while it is in litigation that they are charged with notice of the rights of their vendor's antagonist and take subject to the judgment rendered in the litigation. *Backowski v Solecki*, 112 Mich. App. 401, 412 (1982), 51 Am. Jur. 2d, Lis Pendens, § 1, p. 949. The time for filing the notice is within sixty (60) days after the filing of the complaint concerning the real property. M.C.L. § 600.2701(2). Further, the cancellation of a lis pendens is governed by M.C.L. § 600.2725(1) which provides in pertinent part that the notice shall be



cancelled after the action is settled, discontinued or abated, or final judgment is rendered therein against the party filing the notice.

The Government did not file a timely lis pendens in this action, but even if it had, Michigan law provides that a lis pendens shall be cancelled upon final judgment, therefore, such lis pendens could not incumber the property after final judgment.

The Sixth Circuit also erred in stating that the distinguishing feature in the case before the Eleventh Circuit is that the real property in question had not been sold but in the case at bar the real property has been converted to a fund of money. The United States District Court in its Order of Judgment stated that it deemed the proceeds "to be a substitute res which retains the same legal attributes as the realty for purposes of the instant case." (App. A59)



The Sixth Circuit acknowledges this fact in its opinion. (App. A4) Even absent such agreement, the same result would be reached under Michigan law. The treatment of entireties property is not dependent upon the form it takes. Proceeds from the sale of entireties property are treated as entireties property, *Muskegon Lumber & Fuel Company v Johnson*, 338 Mich. 655 (1954), and a tenant by the entireties is entitled to the enjoyment of the entirety. *Rogers v Rogers*, 136 Mich. App. 125, 134, 356 N.W.2d 288, (1984).

From the foregoing, it is evident Michigan law provides a clear answer which supports the position of the Eleventh Circuit and the Petitioner herein -- the Government can acquire no interest in entireties property when the United States seeks forfeiture under 21 U.S.C. § 881(a)(7) and 21 U.S.C. § 853(n)(6)(A) and there is an innocent spouse. Leah Marks holds the



property at issue as a tenant by the entireties, that is, an indivisible right to own and occupy the entire property otherwise subject to forfeiture and that the property cannot be liened or encumbered in any fashion whatsoever by the actions of Mitchell Marks. In fact, in *Long v Earle*, *supra*, at page 517, the Michigan Supreme Court held that each spouse "is vested with an entire title and as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title." (Emphasis added)

The Sixth Circuit in the instant case has done what is expressly prohibited by Michigan law and, in fact, contrary to its own findings. Even though the Court cited with approval cases which held that neither spouse has an interest in such property which may be conveyed, incumbered or alienated without the consent of the other (A10), yet the Court incumbered the property



without the consent of Leah Marks. The Court also cited with approval cases which held that creditors cannot levy on entireties property to satisfy the debt of an individual spouse (A9), but has likened the Government to a judgment creditor and "liened" the property despite the holding in *Schelowski v. Pawlowski, supra*, that no lien is acquired on real estate in Michigan under a judgment until actual levy of an execution. Further, the Court has denied Leah Marks the use of the property even though Michigan law provides that each spouse is considered to own the whole and is entitled to the enjoyment of the entirety. *Rogers v. Rogers, supra*.

The Sixth Circuit Court of Appeals erred in its decision to grant the Government a lien on the entireties interest of Leah Marks with a direction to the District Court that the escrowed entireties funds be withheld from her and that she may



be entitled to one-half of the interest on the funds. (A36)

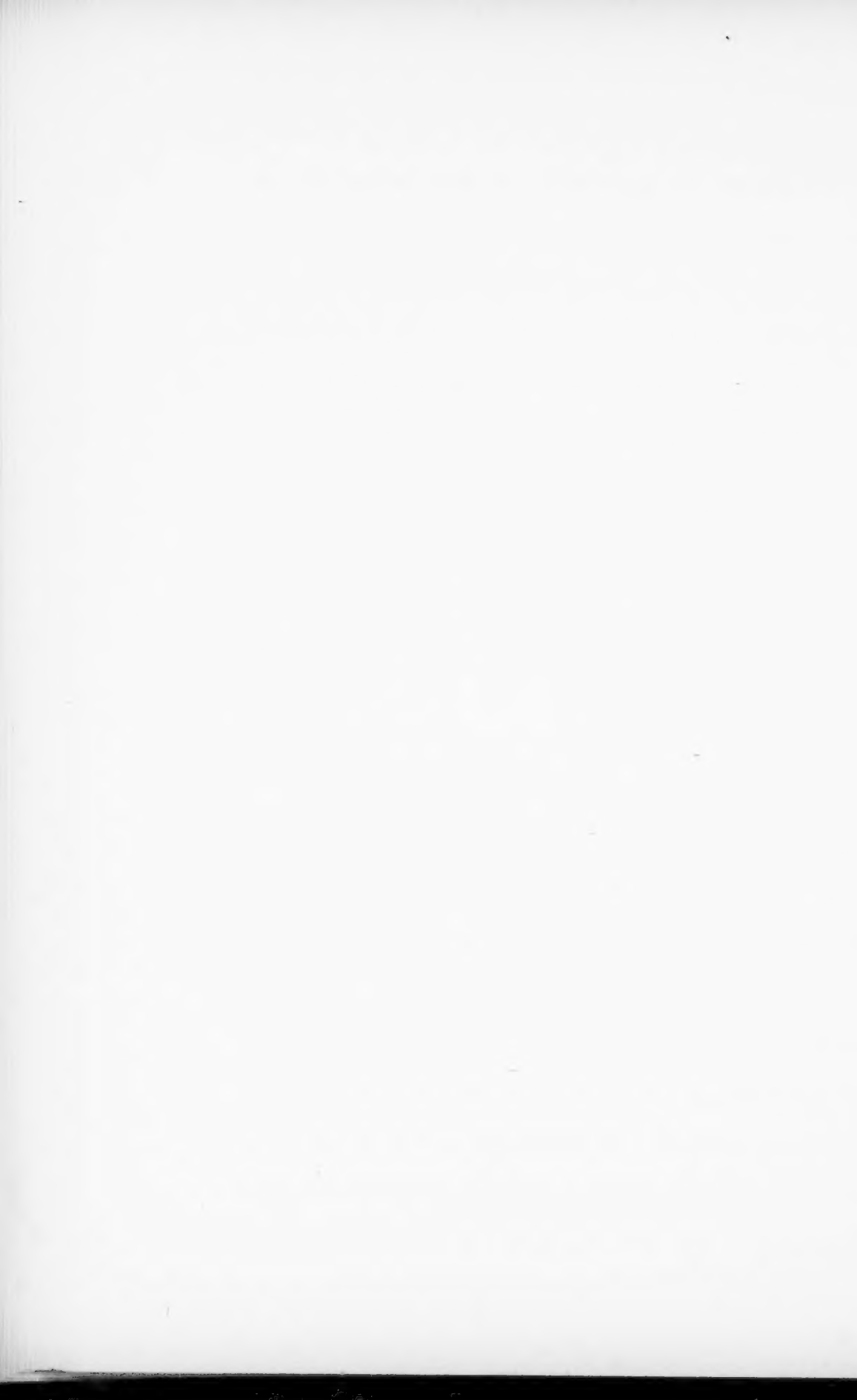
The introductory sentence of § 881(a) provides:

"The following shall be subject to forfeiture to the United States and no property right shall exist in them:"

21 U.S.C. § 881(h) provides:

"All right, title and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section."

Reading subsection (h) of § 881 in tandem with subsection (a), it becomes clear that the "right, title and interest" that vests in the United States upon commission of the unlawful act comprises only so much of the property as is "subject to forfeiture" under the appropriate division of subsection (a). The words of § 881(a)(7) indicate that the Government obtains through forfeiture whatever interest remains in the property after the innocent owner's interest

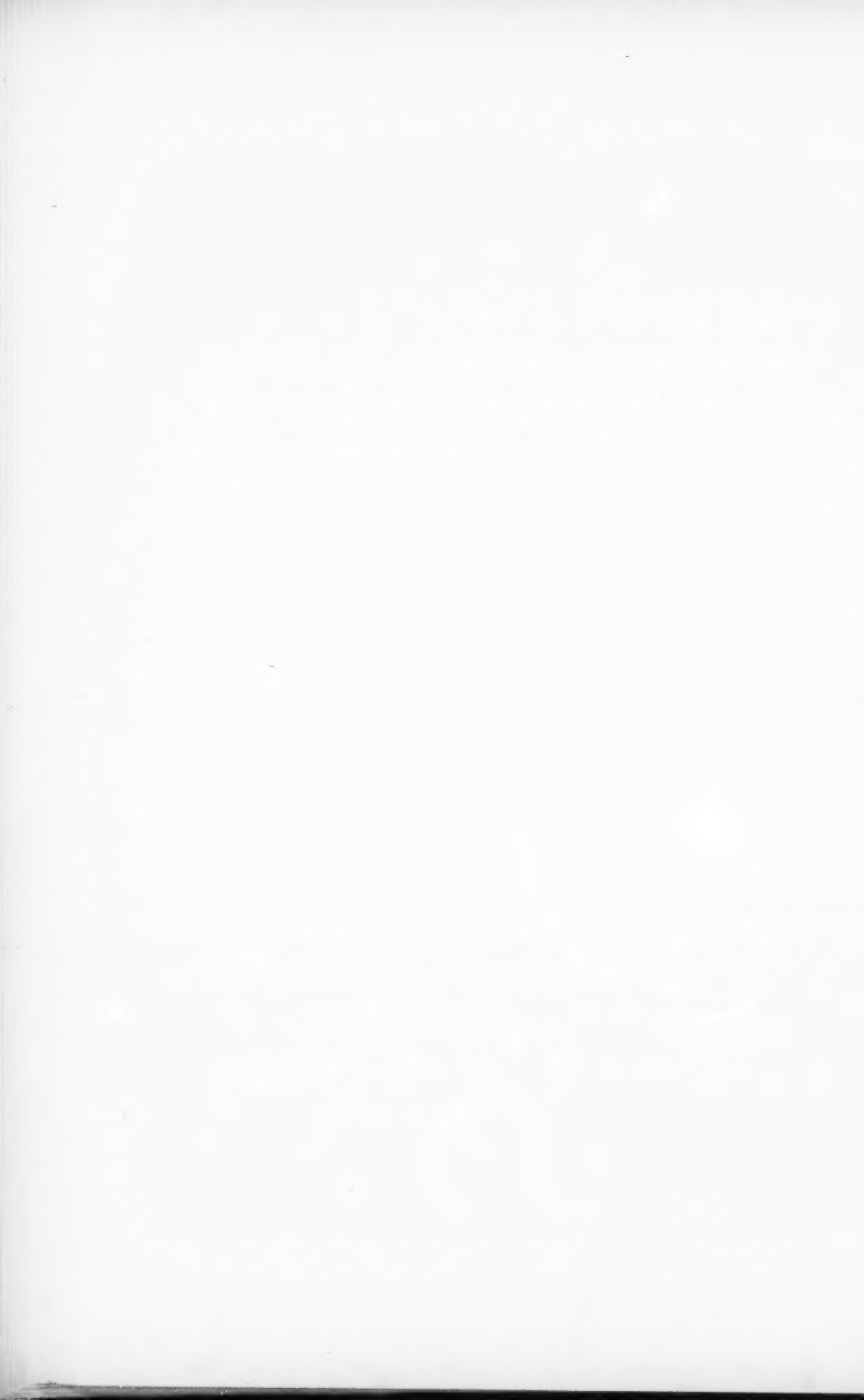


has been excepted. In this case, then, everything except Leah Marks's interest is forfeitable under § 881(a)(7). Unfortunately for the government, Leah Marks's interest encompasses all "right, title and interest" in the property as all three are indivisible between a husband and wife holding property by the entirety. To forfeit some interest in the property to the Government would penalize Leah Marks for the wrongdoing of her husband, in which she neither participated nor had any knowledge and would take her property without due process or just compensation. Congress clearly did not intend such a result when enacting § 881(a)(7). As the Supreme Court noted, "[w]hen the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *United States v. United States Coin & Currency*, 401



U.S. 715, 721-22, 91 S.Ct. 1041, 1044-45, 28 L.Ed. 2d 434 (1971). In fact, Congress included the second clause of § 881(a)(7), protecting innocent owners, to prevent the result which the government now seeks. Thus, using Michigan law to define what property interest Leah Marks has, it is evident that she has an indivisible right of possession, title, and enjoyment of the whole property which cannot be incumbered in any way by a judgment creditor of Mitchell Marks. No interest exists in the subject property which can be forfeited to the government. See *U.S. v. One Single Family Residence*, *Id* at 1516. Even if the government could be likened to a judgment creditor of Mitchell Marks, it is still prohibited under Michigan law from incumbering the property in any manner whatsoever.

Leah Marks's interest in the entireties property, protected from forfeiture by



federal statute, encompasses the whole property and nothing remains to forfeit to the United States.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

LIBERSON, BLOOM, BLOOM & BOCK, P.C.

By: STEPHEN J. BOCK
(Counsel of Record)
26699 West Twelve Mile, Suite 200
Southfield, MI 48034-1578
Phone: (313) 352-5040

WANDA M. BRUSH
26699 West Twelve Mile, Suite 200
Southfield, MI 48034-1578
(313) 352-5040

DATED:

A. Opinion of the United States
Court of Appeals for the Sixth
Circuit Court dated August 8,
1990.

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 88-2238

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

CERTAIN REAL PROPERTY LOCATED
AT 2525 LEROY LANE, WEST
BLOOMFIELD, MICHIGAN, and LEAH
LIZA MARKS,

Defendants - Appellees.

Decided and Filed August 8, 1990.

Before MERRITT, Chief Judge, KRUPANSKY,
Circuit Judge, and GRAHAM, District Judge.*
GRAHAM, District Judge, delivered the
opinion of the Court in which MERRITT, Chief
Judge joined. KRUPANSKY, Circuit Judge
delivered a separate dissenting opinion.

This is an appeal by the Government
from a judgment of the United States

* The Honorable James L. Graham, United States
District Judge for the Southern District of Ohio,
sitting by designation.



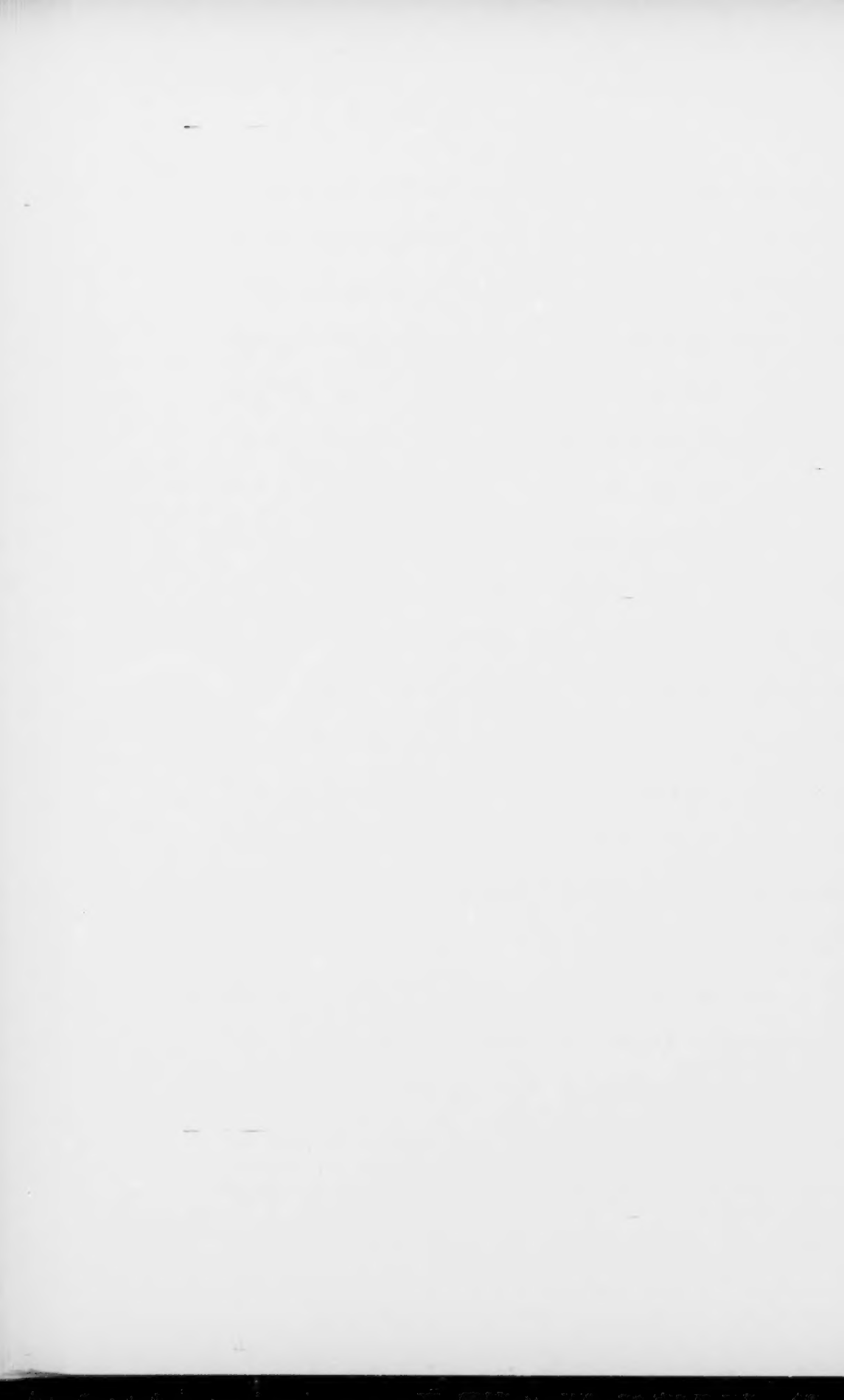
District Court for the Eastern District of Michigan awarding the entire proceeds from the sale of property seized pursuant to 21 U.S.C. § 853 and § 881 to the claimant-innocent owner. The issues presented concern the operation of these federal drug forfeiture statutes upon the interests of an innocent spouse in real property held as a tenancy by the entirety under Michigan Law.

On February 26, 1987, an indictment was returned in the Eastern District of Michigan against Mitchell Dennis Marks. The indictment charged Mitchell Marks with one count of conspiracy to possess with intent to distribute cocaine on or about December 15, 1985 through December 17, 1985 and one count of distribution of cocaine on or about December 15, 1985. The indictment also contained a forfeiture count pursuant to 21 U.S.C. § 853(a)(2), which alleged that Mr. Marks had an interest in real property located at 2525 Leroy Lane, West Bloomfield,

Michigan which he used or intended to use to commit or facilitate the commission of a violation of the Controlled Substances Act. The real property in question was seized pursuant to a warrant issued by a United States Magistrate on February 12, 1987.

Mr. Marks was convicted by a jury and a judgment order imposing sentence was filed on June 6, 1988. The judgment also ordered the forfeiture of Mr. Marks's interest in the real property. On July 15, 1988, Leah Liza Marks, claimant-appellee and wife of Mitchell Marks, filed a petition in the criminal case for a determination of her interest in the real property, as well as a claim to the property.

In the interim, on April 17, 1987, the Government filed a civil complaint for forfeiture pursuant to 21 U.S.C. § 881 (a)(7) against the real property. On May 8, 1987 Leah Marks filed an answer to the complaint, and on May 15, 1987, she filed a



claim of interest in the real property. The civil and criminal forfeiture proceedings were subsequently consolidated.

In the proceedings before the district court, the parties stipulated that the real property known as 2525 Leroy Lane was owned by Leah Marks and her husband, Mitchell Marks, as tenants by the entirety. By agreement of the parties dated April 29, 1988, the real property was sold and the proceeds of the sale were designated as a substitute res in which the parties were deemed to have the same interest as they had in the real estate. The Government and Leah Marks also entered into a stipulation of facts on November 2, 1988, in which the Government agreed that Leah Marks was an "innocent owner" within the meaning of the forfeiture provisions.

By order entered on November 7, 1988, the district court awarded judgment to claimant Leah Marks. The district court



concluded that Leah Marks had a legal interest in the property "rather than" her husband for purposes of 21 U.S.C. § 853 (n)(6)(A), and was an innocent owner under 21 U.S.C. § 881(a)(7), so as to avoid forfeiture of the property. The district court further found that claimant's entireties interest constituted an interest in the property as a whole, and that her innocent owner status operated to avoid forfeiture as to the entire property. For the following reasons, we vacate the judgment of the district court.

The Government proceeded in this case under both the criminal and civil Title 21 forfeiture provisions. The criminal forfeiture statutes, 21 U.S.C. § 853, provides in relevant part:

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for



A6

more than one year shall forfeit to the United States, irrespective of any provision of State law -

* * *

(2) any of the person's property used, or intended to be used, in any manner of part, to commit, or to facilitate the commission of, such violation, . . .

The term "property" in this section includes real property. 21 U.S.C. § 853 (b)(1). When an order of forfeiture has been entered under § 853, a third party asserting a legal interest in the property may petition the court for a hearing to adjudicate the nature of his or her interest in the property. 21 U.S.C. § 853(n). Under 21 U.S.C. § 853(n)(6)(A), relief from forfeiture may be obtained where the petitioner establishes by a preponderance of the evidence that:

the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or



interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section. . .

The provisions for civil forfeiture are found in 21 U.S.C. § 881. Title 21, § 881 (a)(7) provides for the forfeiture to the United States of:

All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The criminal forfeiture provisions of 21 U.S.C. § 853 authorize an *in personam* action against a defendant in a criminal

case, and forfeiture in such a case is imposed as a sanction against the defendant upon his conviction. *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210 (10th Cir. 1986). Civil forfeiture, on the other hand, is an *in rem* proceeding wherein the subject property is treated as being itself guilty of wrongdoing. *United States v. One 1976 Mercedes Benz*, 2805, 618 F.2d 453 (7th Cir. 1980).

The Government's first argument on appeal is that Leah Marks lacks standing under § 853(n)(6)(A) to contest the criminal forfeiture. The Government contends that she lacks a legal interest in the property which was vested in her "rather than the defendant or was superior to" the legal interest of the defendant, as required by that section.

At the time of the illegal acts which rendered the real property subject to forfeiture, Leah Marks and her husband owned

the real property as tenants by the entirety under Michigan law. Tenants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. *Matter of Grosslight*, 757 F.2d 773 (6th Cir. 1985); *Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880 (1918). Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property. *Matter of Grosslight*, 757 F.2d. at 773.

A husband and wife holding by the entireties do not hold as joint tenants. "A joint tenancy implies a seisin *per my et per tout*, while an estate in entirety implies only a seisin *per tout*. *In re Appeal of Lewis*, 85 Mich. 340, 341, 48 N.W. 580 (1891).

A Michigan court in *Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 292-293 (1984) described the entireties estate as



follows:

In Michigan real property law, tenancies by the entirety enjoy an ancient and hoary tradition. The usual and durable method for a husband and wife to hold real estate has been as tenants by the entirety. The classic basis for a tenancy by the entirety was the concept that "the husband and wife are but one person in the law". In a true tenancy by the entirety, each spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entirety, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entirety property, and neither has an interest in such property which may be conveyed, encumbered or alienated.

One incident of an estate by the entirety is that the survivor, whether husband or wife, is entitled to the whole and such right cannot be defeated by a conveyance by one spouse to a stranger. Traditionally, tenancies by the entirety could only be created by a written instrument of conveyance, which produced unity of persons, time, title, interest and possession. (Footnotes omitted).



Thus, under Michigan law, Leah Marks had not only an indivisible interest in the entireties property, but also a survivorship interest which would entitle her to sole ownership of the property upon her husband's death. *Rogers*, 356 N.W.2d at 293. Her survivorship interest constitutes a legal interest in the real property which was vested in her "rather than the defendant" for purposes of 21 U.S.C. § 853 (n)(6)(A). Claimant Leah Marks has standing under that section to contest the criminal forfeiture of the real property in question.

The remaining issues presented by the Government's appeal concern the impact of the forfeiture statutes on Leah Marks's interest in the real property. The Government has stipulated that Leah Marks is an innocent owner within the meaning of those provisions. However, the Government contends that she is entitled, at most, to one half of the proceeds from the sale of

the property.

A central question presented by this case is the role which should be accorded state law in the federal forfeiture scheme. The Government argues that state property law should not be determinative, but rather that the federal courts should develop a federal common law of forfeiture to govern the treatment of property interests. The United States Supreme Court has recognized the authority of the federal courts to create consistent nationwide rules in the face of conflicting state laws. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, (1943). However, a nationwide rule may not be appropriate where Congress has not specifically adopted a federal rule of law, and where the incorporation of state law as the federal rule of decision will not hinder the administration of a federal program. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, (1979).

In *United States v. Yazell*, 382 U.S. 341, (1966), the Supreme Court addressed the application of Texas property law to an action to obtain judgment on a Small Business Administration loan. Under Texas law, the respondent wife of the business owner and co-signer of the loan note was deemed to lack the capacity to contract with the Small Business Administration, and thus she could not be held liable for the note. The Supreme Court recognized that state law could be overridden where federal programs or actions must be uniform throughout the United States, as in the case of *Clearfield Trust Co.*, *supra*, which involved the remedial rights of the United States with respect to federal commercial paper. *Yazell*, 382 U.S. at 354. The court in *Yazell* went on to note that the single loan transaction was not a nationwide act of government warranting the adoption of a uniform rule of law. *Id.*, 382 U.S. at 348.

Likewise, state law rules have been adopted as the federal law to be applied despite the consequent diversity in the rights and obligations of the United States in the various states. *Id.*, 382 U.S. at 354-357. Finally, the court held that in absence of specific congressional action, state laws governing family property arrangements would be overridden by federal courts only where clear and substantial interests of the national government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied. *Id.*, 382, U.S. at 348-352.

As noted above, the Government proceeded in this case under both the civil and criminal forfeiture provisions in Title 21. We see no language in the civil forfeiture provisions which would mandate the application of a federal common law of property. We conclude that recognition of



state laws governing property rights does not contravene the federal forfeiture scheme, and that the application of state law is the most appropriate method of determining the interest of an innocent owner under 21 U.S.C. § 881(a)(7). We note that state laws governing tenancies by the entirety have been applied by federal courts in determining the interests available for the satisfaction of a federal tax lien, where the tax lien statute, like the forfeiture statutes, contained no definition of property rights. Cf. *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir.1971)

In interpreting the criminal forfeiture scheme, we must reconcile the apparent clash of §§ 853(a) and (n). Subsection (a) provides that a person convicted of certain felony drug offenses shall forfeit to the United States, "irrespective of any provision of State law", any of his property which was used to commit or facilitate the



commission of such offenses.

By drafting this forfeiture statute to operate "irrespective of any provision of State law," it would at first appear that Congress supplanted, albeit inadvertently, state-determined property rights with a case-by-case development and application of a federal common law of property whenever state property laws seems to limit the Government's absolute access to assume ownership of property by forfeiture. But rather than read the language of § 853(a) in a vacuum, we consider it in conjunction with § 853(n), which overrides whatever impact § 853(a) might have on the status of state-created property rights.

Under § 853(n), a third party asserting a legal interest in the property may petition the court for a hearing to adjudicate the nature of his or her interest in the property. Specifically, § 853(n)(3) provides that the third party's petition



must "set forth the nature and extent of the petitioner's right, title, or interest in the property, [and] the time and circumstances of the petitioner's acquisition of the right, title, or interest. . . ." (emphasis added). Further, under 21 U.S.C. § 853(n)(6)(A), a relief from forfeiture may be obtained where the petitioner establishes by a preponderance of the evidence that:

the petitioner has a legal right, title or interest in the property, and such right, title or interest was vested in the petitioner rather than the defendant or was superior to any right, title or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section. . . (emphasis added).

Only a strained reading would permit us to infer that § 853(n) describes rights, titles, or interests acquired under a spontaneous federal common law of property. Property interests have long been acquired



and defined by state law; it was with those interests in mind that Congress drafted provisions for the protection of innocent third parties. Decades before Congress enacted § 853, state-defined property interests, many of which are still held by the original grantees or remaindermen, had been acquired throughout the various states. As a result, logic leads us to conclude that Congress's repeated use of clear language in § 853(n) necessarily survives the "irrespective of State law" provision in § 853(a). When Congress provided for the forfeiture of property "irrespective of State law", it intended solely that state law offer no protection to the convicted defendant's interests in that property. The provisions of § 853(a) were never meant to restrict the property interests of an innocent owner.

The Government argues that a federal common law of forfeiture is needed to



effectuate the goals and purposes of the federal forfeiture scheme. Forfeiture statutes serve the ends of law enforcement by preventing further illicit use of the property and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687, (1974). The drug forfeiture provisions aid law enforcement efforts in the area of illegal drugs. *United States v. One 1977 Cadillac Coupe DeVille*, 644 F.2d 500 (5th Cir. 1981).

The Government suggests that drug dealers will circumvent the impact of the forfeiture statutes by investing their assets in property such as entireties property which may be shielded from forfeiture by reason of the nature of the property interest under state law. However, such evasive actions would be undermined by the heavy burden placed upon claimants to

prove their innocent ownership status.

The dissent expresses concern that preservation of the remainder interest in an entirety estate paves the way for "artful planning on the part of drug dealers." Under Michigan law, however, a late conveyance engineered after beginning the criminal enterprise in order to protect the property from creditors or forfeiture - would be thwarted by the relation-back provision, under which the Government's interest in the property relates back to the time of the commission of the crime. 21 U.S.C. § 853(c). Creation of an entirety estate just prior to commission of the crime could, as in a bankruptcy context, be challenged in certain instances as a fraudulent conveyance. See *United States v. One Single Family Residence*, 699 F.Supp. 1531 (S.D. Fla. 1988); *Dunn v. Minnema*, 434 323 Mich. 687, 36 N.W.2d 182 (1949).

In addition, forfeiture statutes are

intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. *United States v. United States Coin & Currency*, 401 U.S. 715, 721, (1971). Here, a penalty has been imposed upon Mr. Marks, who has forfeited his interest in the property. The protection of the interest of an innocent owner as that interest is defined under state law is not inconsistent with federal forfeiture policy. The dissenting opinion notwithstanding, § 853 (o), which states that "[t]he provisions of this section shall be liberally construed to effectuate its remedial purposes", is uninstrusive. The protection of innocent owners is no less remedial than official efforts to "curb the cascading nationwide drug trade." This is not a case where clear and substantial interests of the United States will suffer major damage if state law is applied. *Yazell*, 382 U.S. at 352.

Each forfeiture proceeding is based

upon unique circumstances. Forfeiture proceedings implicate property rights which have traditionally been measured in terms of state law. *Yazell, supra*. The forfeiture provisions of 21 U.S.C. §§ 853 and § 881 contain no rules of law for defining the scope of an innocent owner's property interests, and thus Congress has not expressly preempted this area with specific definitions or guidelines. We decline to formulate a uniform federal rule of decision, and conclude that it is appropriate to refer to state law in determining the nature of the property interest claimed by a third party in forfeiture proceedings under 21 U.S.C. §§853 (n) and § 881(a)(7).

The remaining issues concern the effect of the forfeiture provisions on the entirety interest of Leah Marks under Michigan law. We must determine what interest the Government gains in the

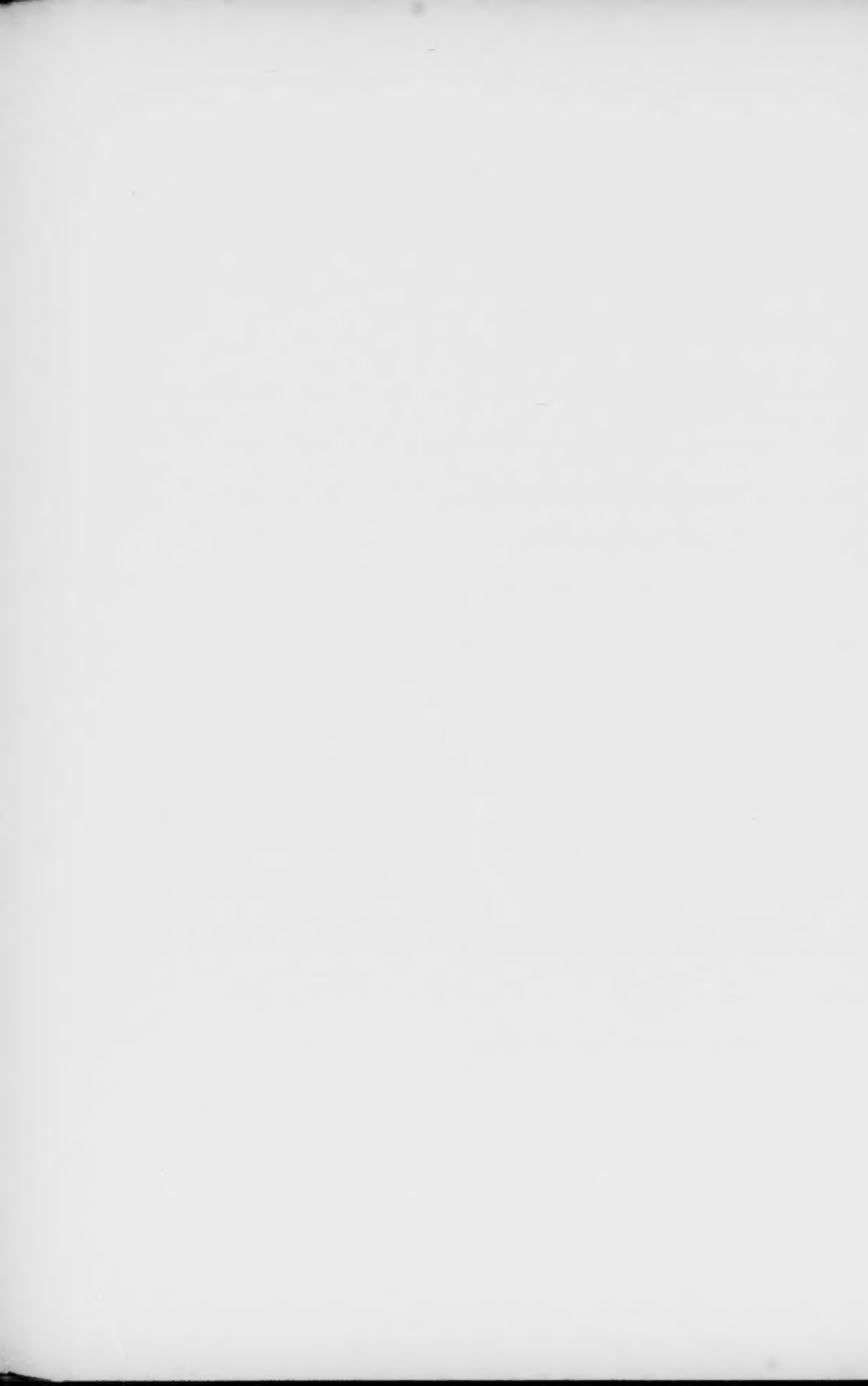


property as the result of the forfeiture of Mr. Marks's interest. The Government relies on various theories to support its position that the Government should recover at least one half of the property. The Government cites *United States v. Rodgers*, 461 U.S. 677, (1983) as being analogous to this case. *Rodgers* involved the impact of 26 U.S.C. § 6321, which creates a tax lien on property in favor of the United States, upon homestead property as defined by Texas law. The Court held that the homestead rights under Texas law did not protect the property from *in rem* proceedings under 26 U.S.C. § 6321, and formulated a possible mechanism for compensating the nondelinquent spouse for her interest in the property using the economic equivalents for a life estate. *Id.*, 461 U.S. at 692-700. However, the Court's decision was based on its broad interpretation of § 6321, which permitted the Government to "subject any property, of



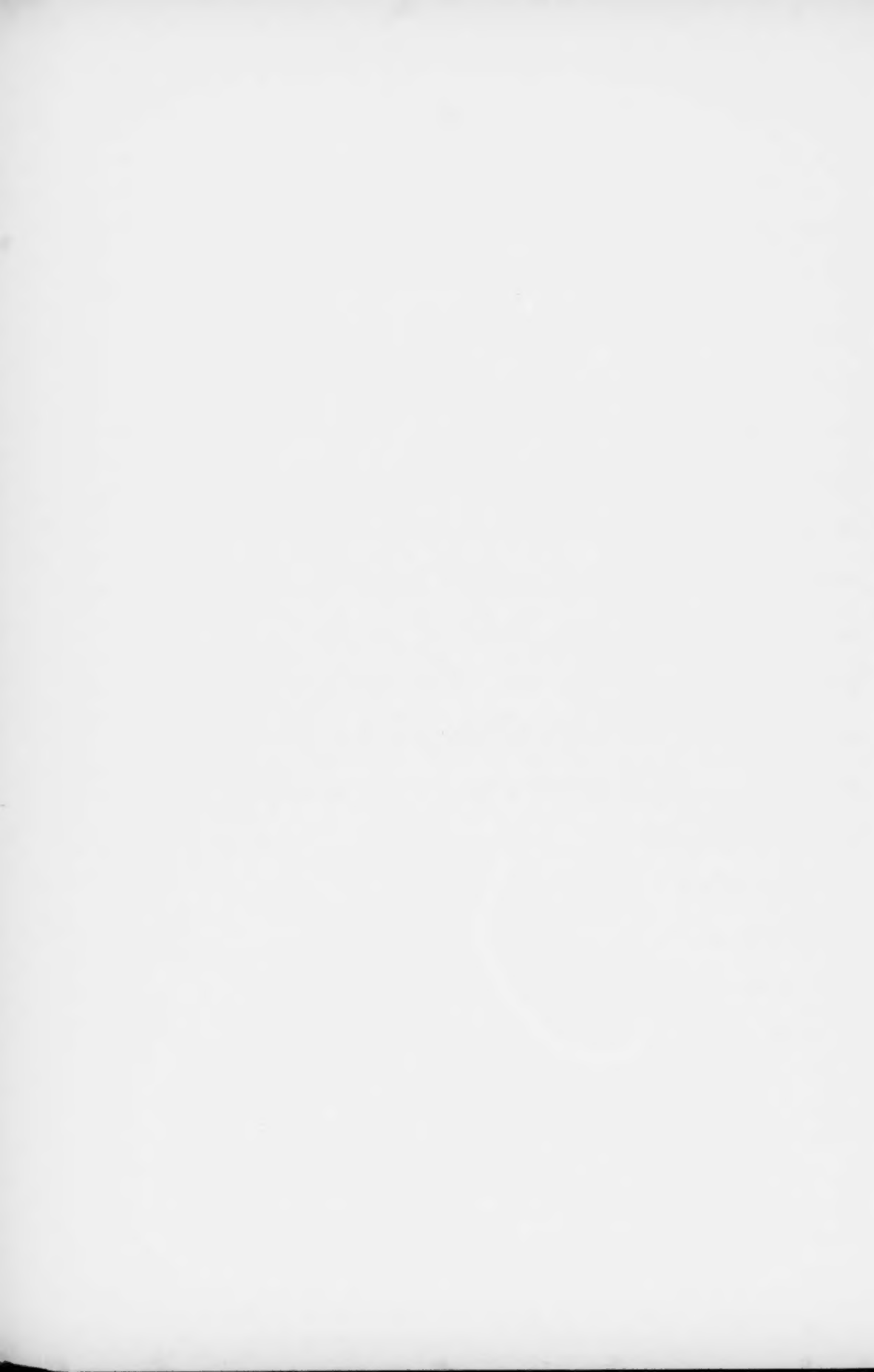
whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." *Id.*, 461 U.S. at 692. (emphasis provided by the Supreme Court). This provision allowed the lien to attach to the property of the delinquent taxpayer regardless of the nature of third party interests in the property. The Court further recognized, *Id.*, 461 U.S. at 703, n. 31, that tenancies by the entirety posed a problem distinct from the issue of homestead rights.

Under Michigan law, entireties property may be levied upon by the State for nonpayment of real estate taxes on the real property itself. See *Robbins v. Barron*, 32 Mich. 36 (1875). However, entireties property may not be attached to satisfy the personal tax liability of a single spouse. *Cole v. Cardoza*, 441 F.2d at 1343; *United States v. Nathanson*, 60 F.Supp. 193 (E. D. Mich. 1945).



In contrast to the statute involved in *Rodgers* the *in rem* provisions of 21 U.S.C. § 881(a)(7) specifically provide that "no property shall be forfeited under this paragraph, to the extent of an interest of" an innocent owner. (Emphasis supplied). Under 21 U.S.C. § 853(n)(6)(A), the interest of a third party in the property may render "the order of forfeiture invalid in whole or in part." (Emphasis added). Under these provisions, the interest of a third party may be so extensive as to include the entire property, thereby defeating the Government's interest completely. Thus, the analysis in *Rodgers* does not support the Government's position in this case.

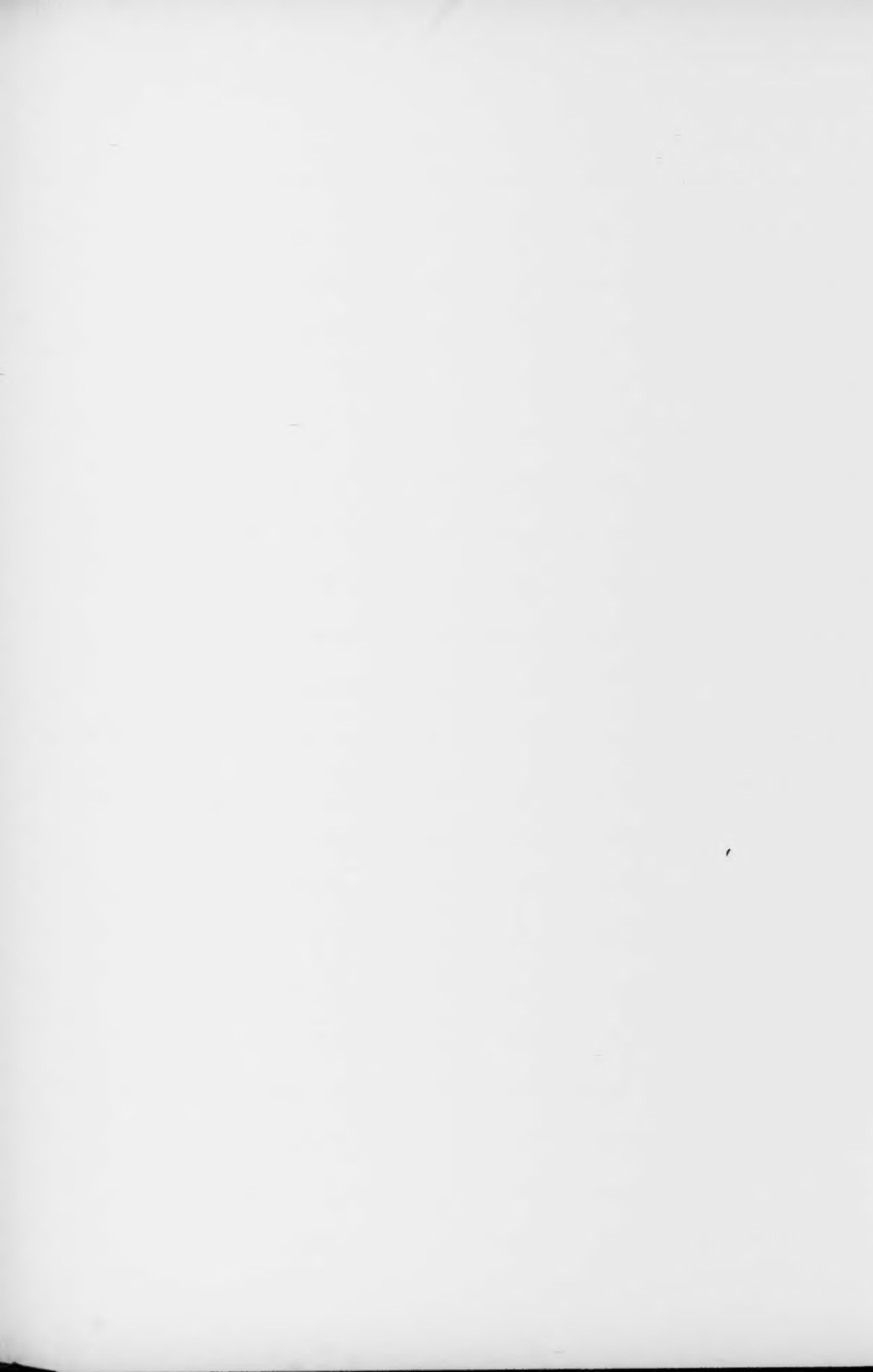
The Government relies on *United States v. One Parcel of Real Estate*, 715 F.Supp. 355 (S. D. Fla. 1989), where the court reasoned that the Government became co-owner of the property by reason of the relation back vesting provision, 21 U.S.C. § 881(h),



at the time of the illegal act, thereby destroying the unities of title, time, marriage and possession and converting the tenancy by the entirety into a tenancy in common.

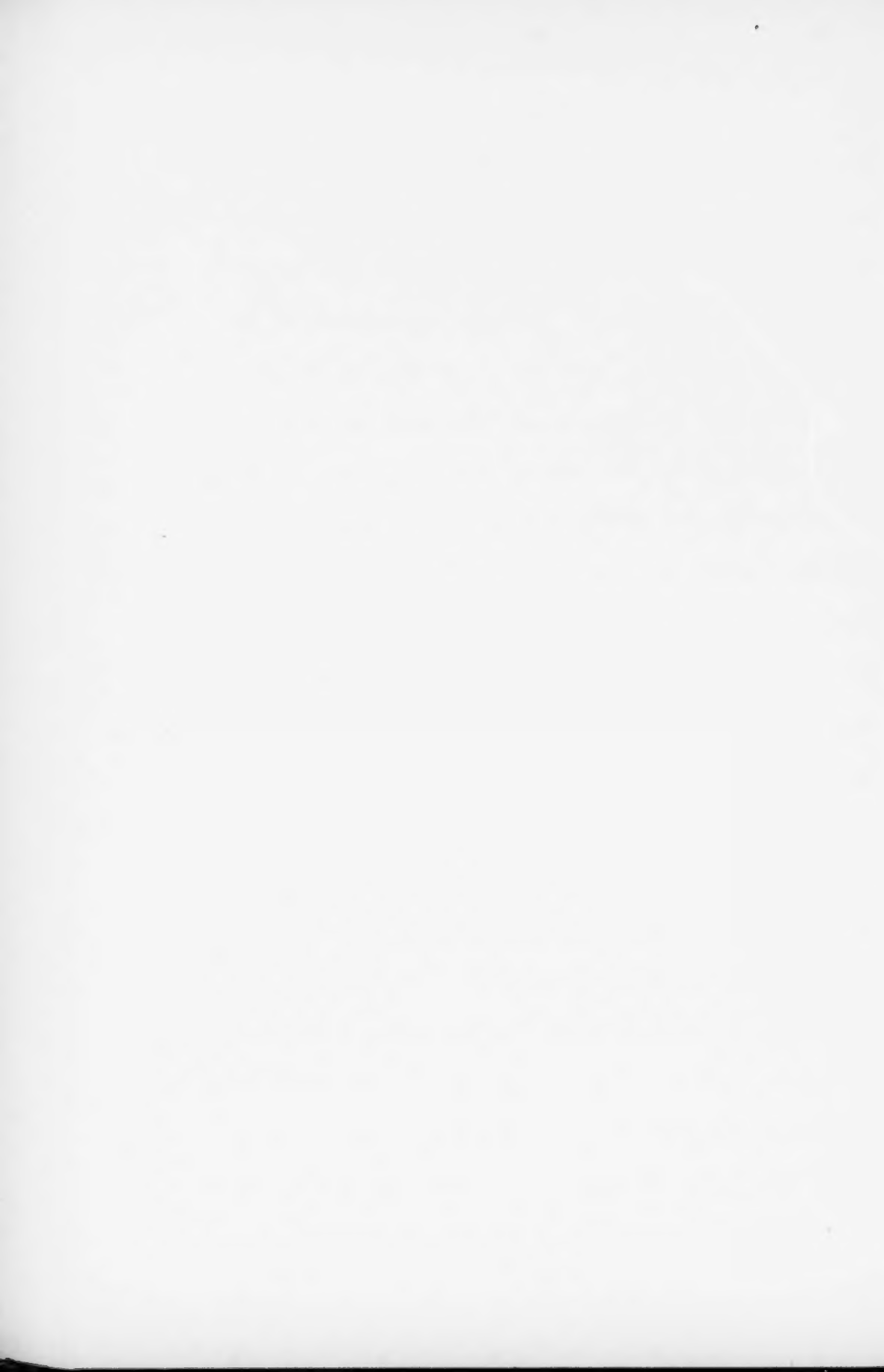
Under the reason in *One Parcel of Real Estate*, the Government would assume ownership of the entire property at the commission of the illegal act, thereby terminating the entirety estate. However, this interpretation of the forfeiture statutes operates to reduce what would otherwise be the spouse's interest in the entire property under state law. Under 21 U.S.C. § 881a)(7), "no property shall be forfeit under this paragraph, to the extent of an interest of" an innocent owner.

The criminal forfeiture statute also has a relation back provision which vests title of the property in the United States upon the commission of the illegal act. See 21 U.S.C. § 853(c). However, that statute



contains a provision which permits a petitioner to establish that he or she has a legal interest in the property which renders the order of forfeiture invalid in whole or in part. 21 U.S.C. § 853(n)(6)(A). The purpose of the relation back provision in § 853(c) is to allow the Government to reach property which has been transferred to third parties to avoid the impact of forfeiture, *United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1987), not to deprive innocent owners of their legitimate interest in the property.

Reading the forfeiture statutes as a whole, there is no indication that Congress intended that the relation back provisions deprive an owner of part or all of his or her entireties interest in property acquired prior to the commission of the illegal acts. We conclude that the relation back provision of § 881(h) and the analogous provision in § 853(c) did not result in conversion of the

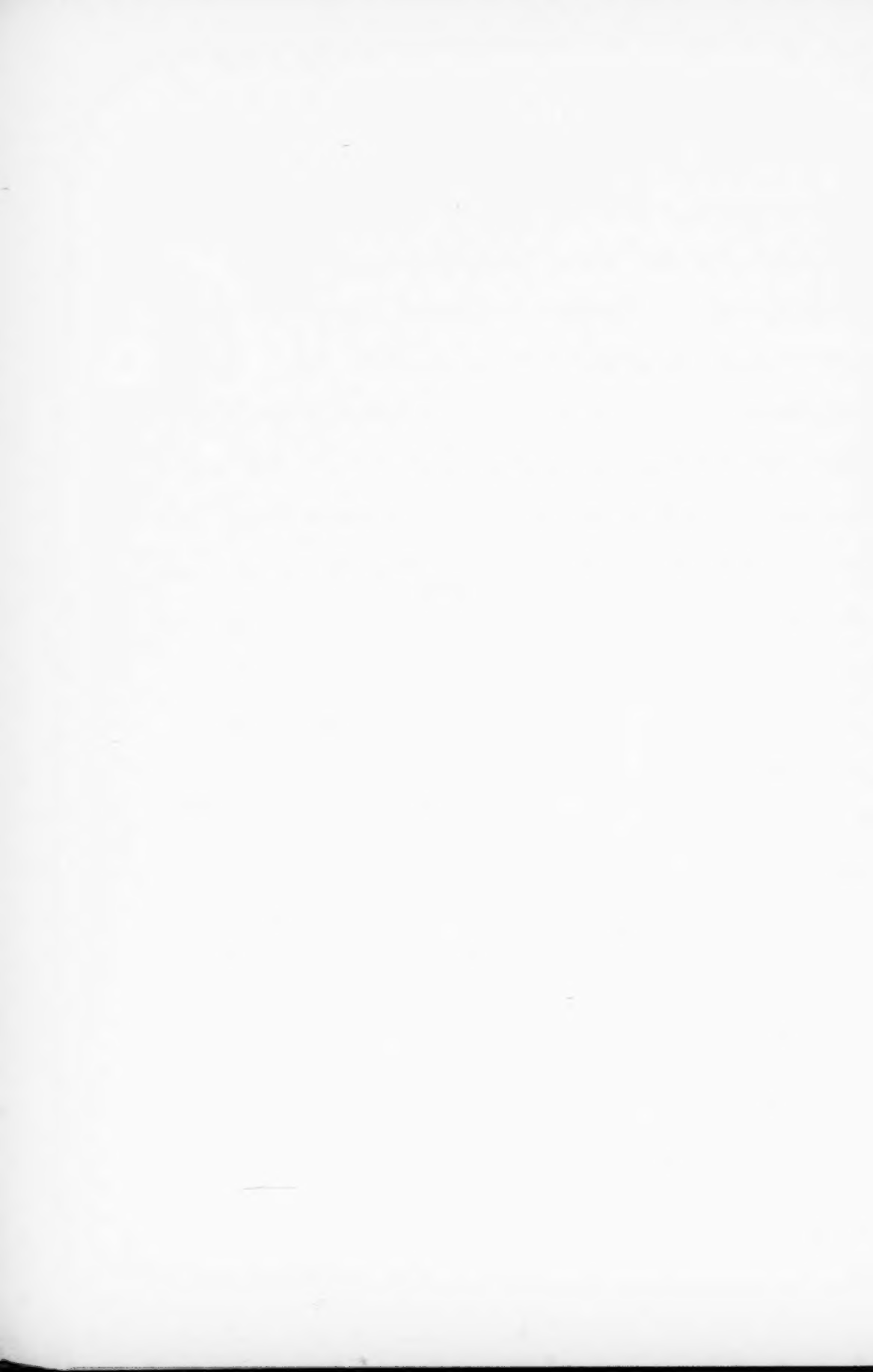


entireties estate owned by Leah Marks and her husband into a tenancy in common. While the federal forfeiture scheme permits the Government to assume Mr. Marks's interest in the property, it may not by virtue of the forfeiture alter the essential characteristics of the entireties estate. To sever the entireties estate in favor of a tenancy in common among Mrs. Marks and the Government would not merely prevent a windfall to Mrs. Marks, as suggested by the dissent, but would vest the Government with a greater interest than that held by the individual wrongdoer whose interests the Government has acquired, and would not adequately compensate Mrs. Marks for her survivorship interest. Rather than converting the estate into a tenancy in common, it is necessary to examine the nature of Leah Marks' interest as it existed up to the initiation of forfeiture proceedings.



The Michigan law previously discussed indicates that Leah Marks has an indivisible interest in the whole property held by the entirety. Under Michigan law, the individual interest of a tenant by the entirety is the functional equivalent of a life estate with a right of survivorship. The survivorship interest is in the nature of a remainder triggered by the death of either spouse, and, necessarily, the survivorship of the other spouse. The occurrence of the contingency converts the survivor's life estate to fee simple absolute. Consequently, only if Mrs. Marks were to predecease Mr. Marks would the latter realize his survivorship interest.

If the marriage terminates in divorce, the entirety estate is converted into a tenancy in common by operation of statute. See M.L.C.A. § 552.102. Here, Mr. and Mrs. Marks are still married, and therefore, the entirety estate is still intact under



state law, even though by operation of the federal forfeiture statutes, Mr. Marks no longer has any interest in the property. The entireties estate may also be destroyed through a joint conveyance of the property by husband and wife, but here, Mrs. Marks has agreed to no such conveyance.

We find that *Lewis v. Homeowners Insurance Co.*, 172 Mich. App. 443, 432 N.W.2d 334 (1988), relied upon by the Government, has no impact upon the entireties estate in this case. In *Lewis*, the court held that the wife could recover half of the insurance proceeds after the entireties property was destroyed through arson committed by her husband. However, the result in that case was reached through an interpretation of the insurance contract, and was not based on the nature of the wife's interest in the property.

In light of the parties' stipulation to treat the cash proceeds of the forced sale



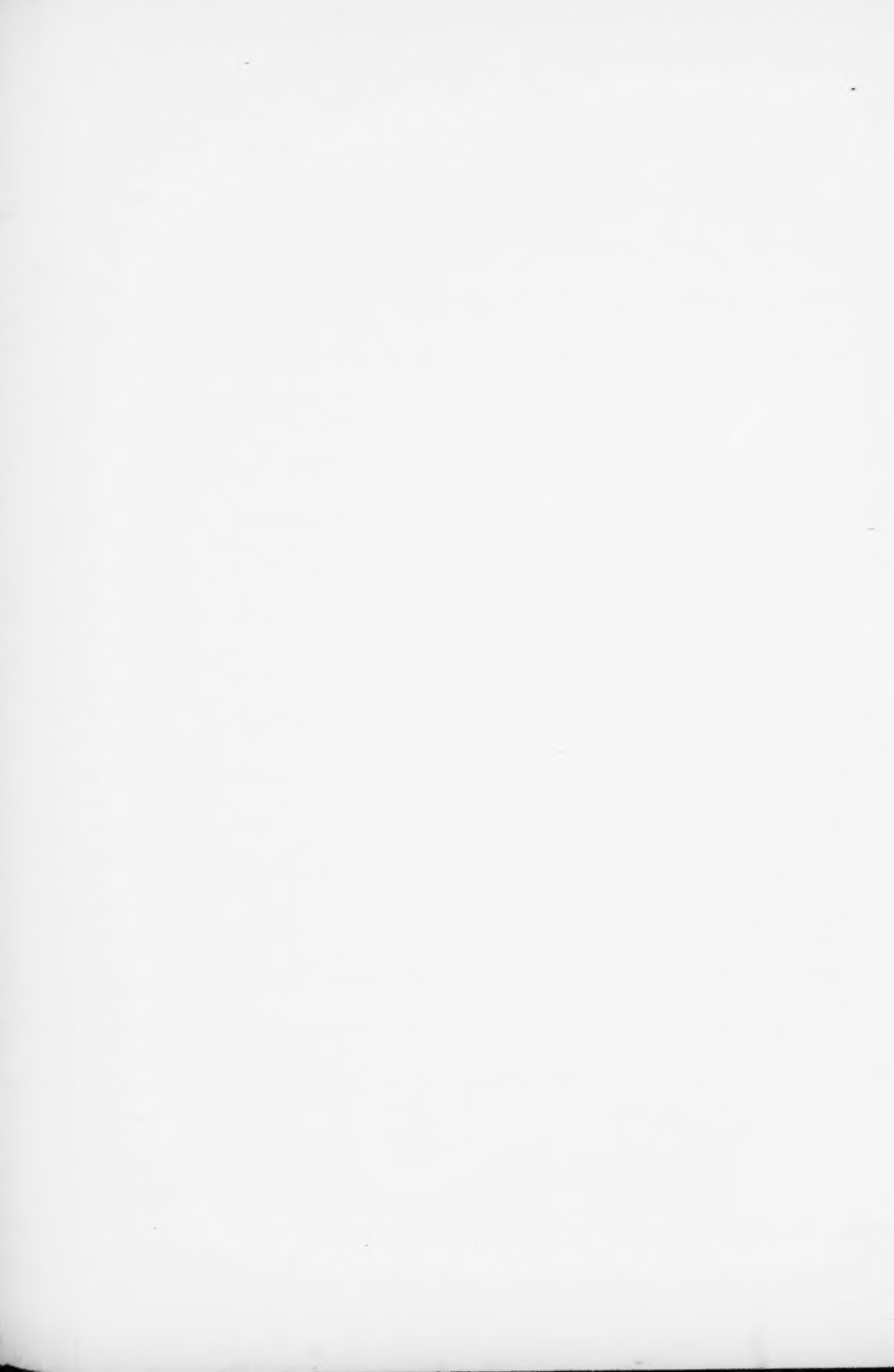
as though they retained the same qualities as entireties property, the Government may properly acquire only the interest which Mr. Marks held as cotenant by the entireties. However, the Government cannot occupy the position of Mr. Marks in the entireties estate, since the estate is founded on marital union, and the Government obviously cannot assume the role of spouse to Mrs. Marks. By acquiring Mr. Marks's interest in the entireties estate, the Government is precluded from obtaining Mr. Marks's interest in the property unless and until Mrs. Marks predeceases her husband or the entireties estate is otherwise terminated by dissolution of the marriage or joint conveyance. However, we do not agree with the district court's finding that the entire property vested in Mrs. Marks by reason of the forfeiture. Instead, we conclude that the interest acquired by the Government is most analogous to the position occupied by



a judgment creditor of one spouse under Michigan law.

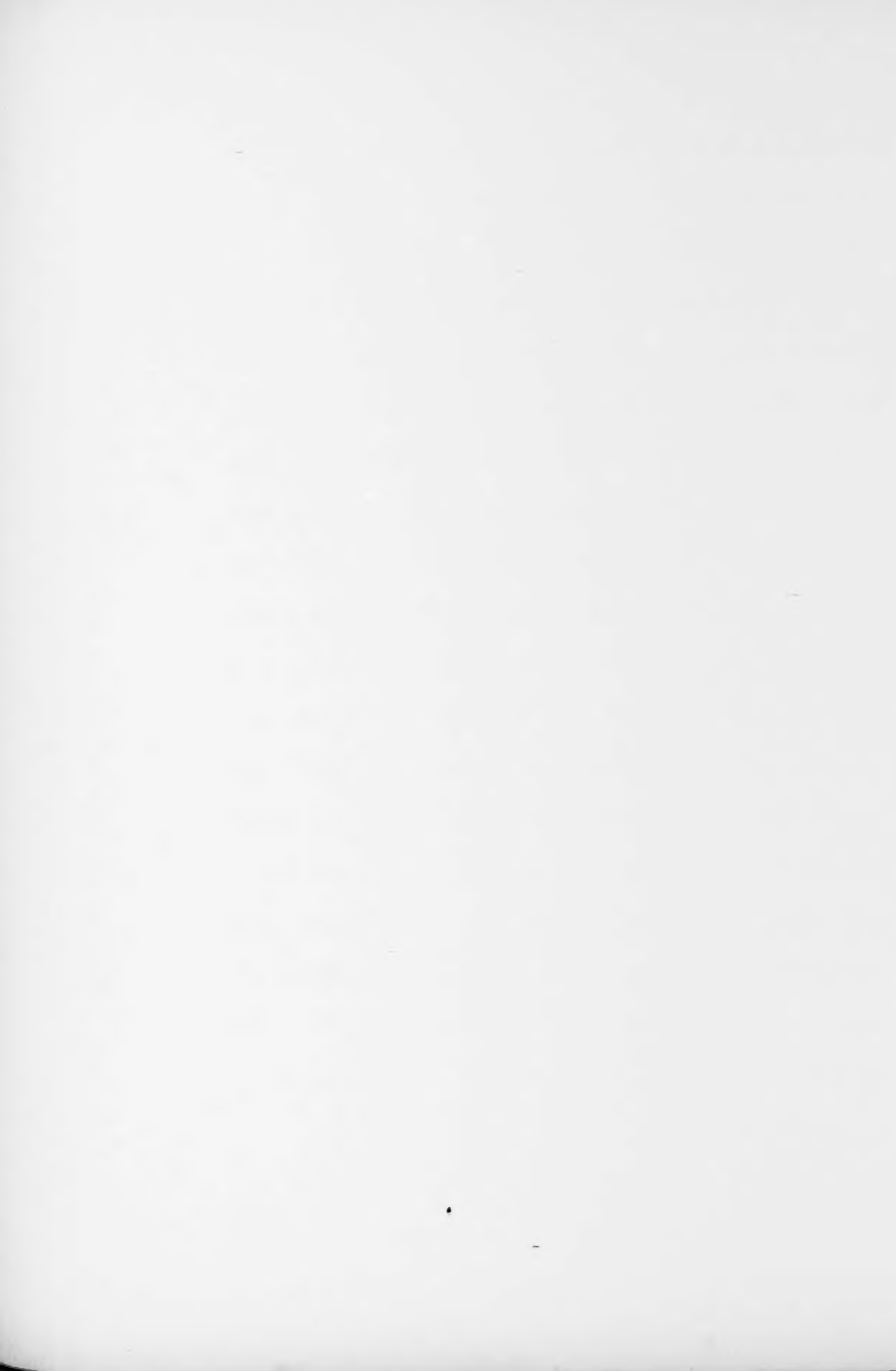
The exact nature of the parties' rights would be more readily determinable if the real property here had not been sold. Mrs. Marks would be entitled to live in the house during the duration of the tenancy, and the Government would have a lien on the property to the extent of the value of Mr. Marks's interest which would prevent Mrs. Marks from obtaining the entire proceeds upon the sale of the property. Here, the real property has been sold, and the district court must determine on remand how to manage the fund of money in such a way as will protect the Government's interest as a judgment creditor, while at the same time permitting Mrs. Marks the use of that property consistent with her interest as a tenant by the entirety.

We note that during the pendency of this appeal, the judgment of the district



court in *United States v. One Single Family Residence*, 699 F.Supp. 1531 (S. D. Fla. 1988) was affirmed by the Eleventh Circuit court of Appeals. See *United States v. One Single Family Residence*, 894 F.2d 1511 (11th Cir.1990). The Eleventh Circuit determined that under Florida law, the interest of the innocent spouse in entireties property was not subject to forfeiture by reason of the criminal activity of her husband, and that federal law as contained in 21 U.S.C. § 881 (a)(7) did not operate to preempt state law in that regard. The court stated, *Id.*, at 1516, that "using Florida law to define what property interest each of the Aguileras has, we find that no interest exists in the subject property which can be forfeited to the government at the present time." The Eleventh Circuit went on to note, 894 F.2d at 1516, n.6:

Nothing would prevent the government from attempting to execute or levy on its interest



should the entireties estate be altered by changes in circumstances or by court order. That is, we do not rule out the possibility that if the United States filed a lis pendens against the property, the government might acquire in a later forfeiture proceeding Mr. Aguilera's interest in the property should he divorce his spouse, should Mrs. Aguilera predecease him, or should their interests be transmitted into some divisible form by their actions or by law. In such case, their interests would become distinct and separable so that forfeiture of his interest in the property would not affect her rights.

Our opinion in the present case is consistent with the conclusions reached by the Eleventh Circuit. The distinguishing feature in the case before the Eleventh Circuit is that the real property in question had not been sold, and therefore whatever future interest the Government might have in the property would be protected by the filing of a lis pendens. here, however, the real property has been converted to a fund of money which could



easily be dissipated. Therefore, it becomes necessary in this case to hold the money in escrow, thereby establishing in effect a *lis pendens* in order to protect the Government's interests in anticipation of the occurrence of some event which may result in the vesting of the Government's interest in the proceeds of the property.

While we leave the determination of the precise scope of the Government's interest under Michigan law to the district court, we note some cases which may be instructive. As previously noted, the judgment creditors of one spouse may not levy against entireties property through a forced sale. *Matter of Grosslight*, 757 F.2d at 773. The creditors of the husband alone cannot reach the husband's share of proceeds from a foreclosure sale of the entireties real estate, *Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655, 62 N.W.2d 619 (1954), or rents from property held by the



entireties, *Peoples State Bank of Pontiac v. Reckling*, 252 Mich. 383, 233 N.W. 353 (1930); *Battjes Fuel & Bldg. Material Co. v. Milanowski*, 236 Mich. 622, 211 N.W. 27 (1926). However, although Michigan law precludes a forced sale of property to enforce a judgment lien, we have found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entireties estate. Each tenant by the entirety is entitled to share equally in the rents and profits derived from the entireties property. Thus, it may be that Mrs. Marks would be entitled to one-half of the interest from the fund of money. Consistent with the prohibition against unilateral alienation of the entireties property by one tenant, Mrs. Marks would not be able to reach her share of the principle of the fund unless or until the entireties



estate terminated through the death of Mr. Marks, upon which she would be entitled to the entire fund, or through other termination of the entirety estate, at which time Mrs. Marks would be entitled to one half of the fund. The Government would be entitled to the entire fund if Mrs. Marks predeceased Mr. Marks, and to one half of the fund upon some other termination of the marriage or an agreement between Mrs. Marks and the Government to terminate the tenancy.

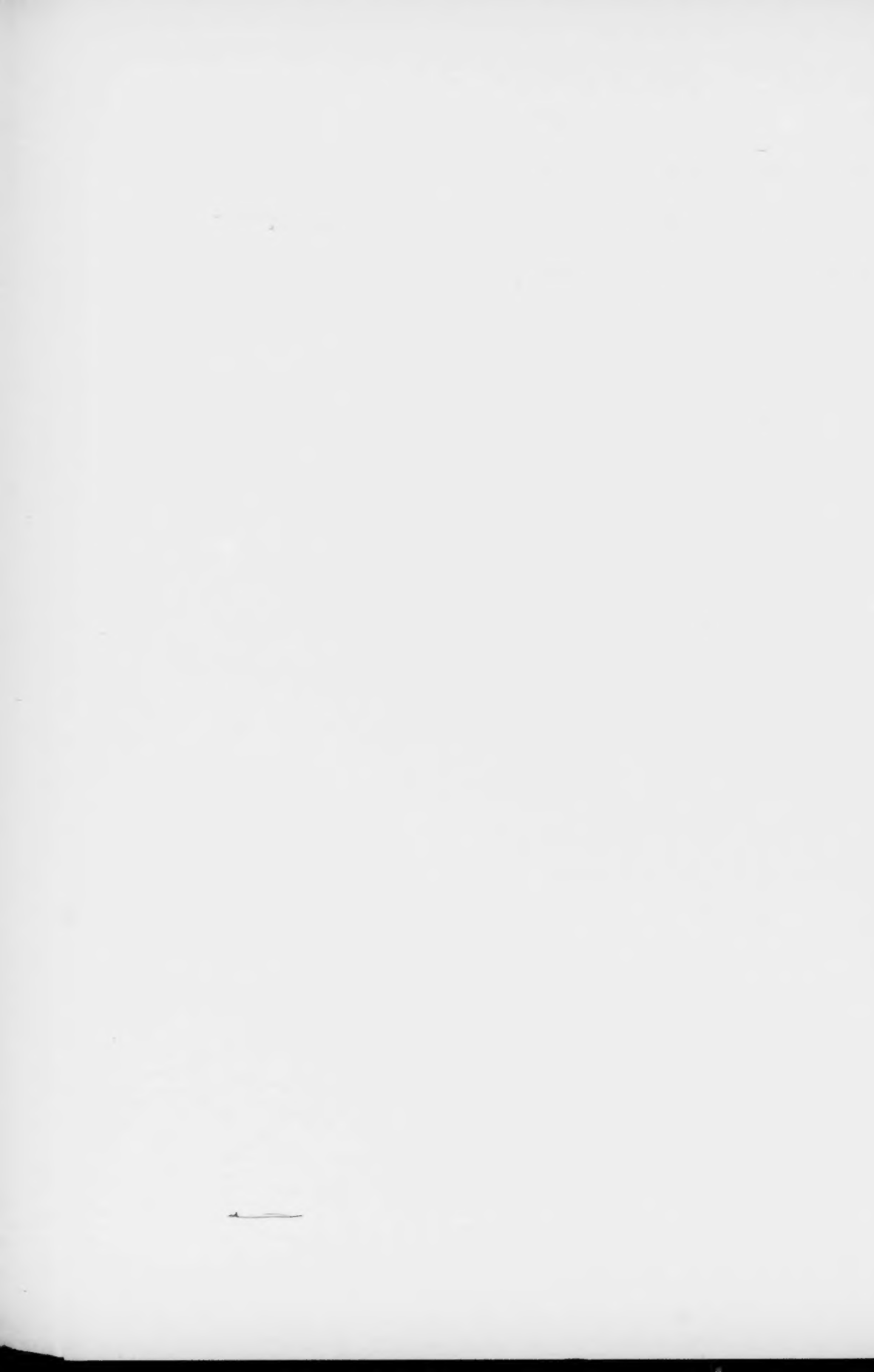
We likewise leave to the discretion of the district court the determination of how to best manage and invest the fund in such a way as to protect the interests of both Mrs. Marks and the Government.

Of course the parties are entitled to compromise and settle their respective interests by agreeing among themselves upon a division of the fund. Because Mr. Marks's interest in the property has been forfeited to the Government, the interested parties



for purposes of settlement are the Government and Mrs. Marks. The court would commend to the parties the services of its settlement office under the supervision of Mr. Robert Rack, who may be able to assist the parties in effectuating a fair settlement and a fair division of the fund of money in question.

For the foregoing reasons, the judgment of the district court is hereby vacated, and this case is remanded to the district court for further proceedings consistent with this opinion.



UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 88-2238

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

CERTAIN REAL PROPERTY LOCATED
AT 2525 LEROY LANE, WEST
BLOOMFIELD, MICHIGAN, and LEAH
LIZA MARKS,

Defendants - Appellees.

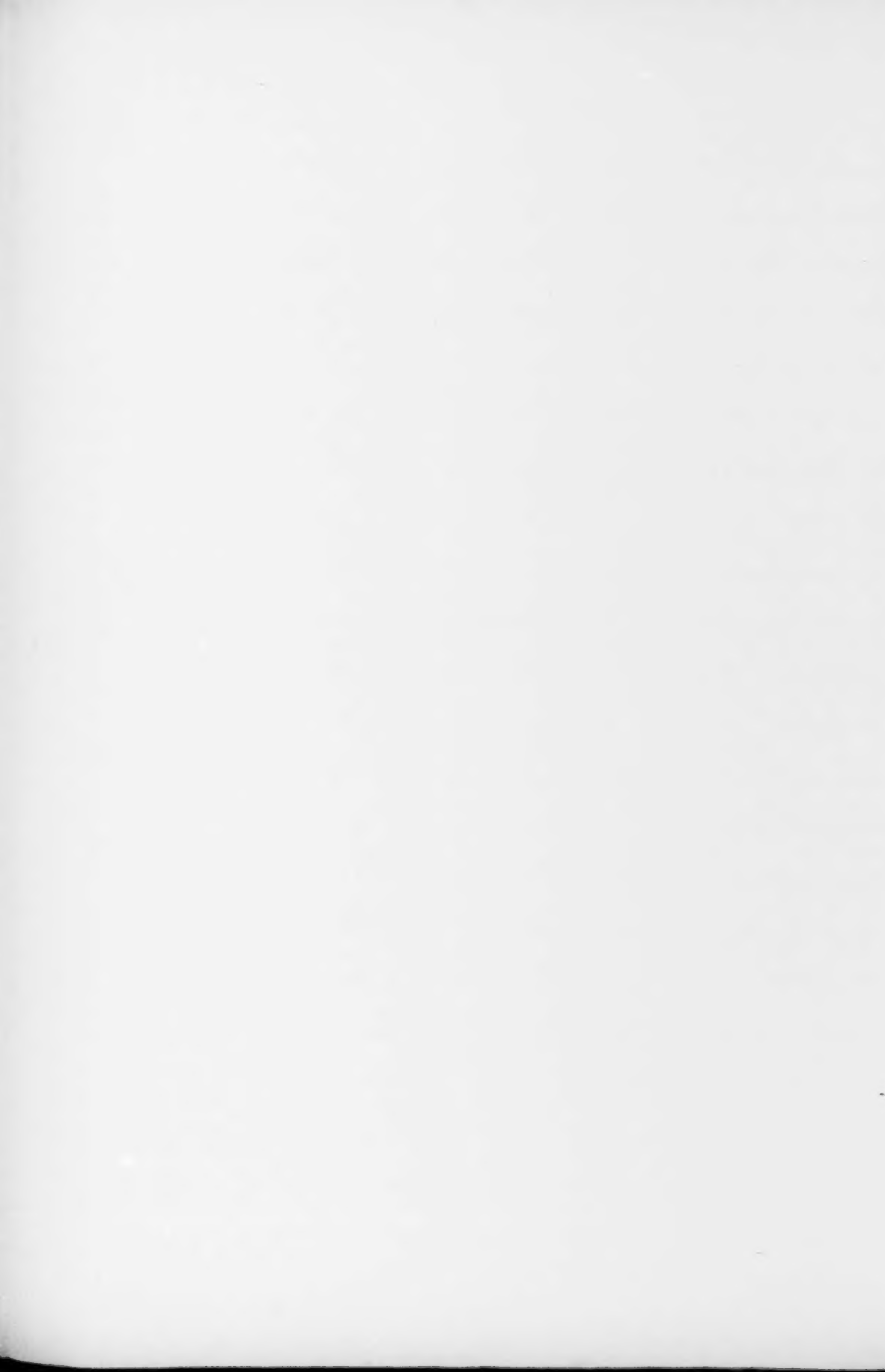
Decided and Filed August 8, 1990.

KRUPANSKY, Circuit Judge, dissenting.

The majority, in ruling that the government becomes, in effect, a judgment creditor against the entireties estate of Mitchell and Leah Marks (appellee) by virtue of Mitchell's conviction for a narcotics offense, ignores the compelling public interest underlying the federal criminal penalty of forfeiture intended by Congress as an immediate, certain, and severe deterrent of uniform implementation

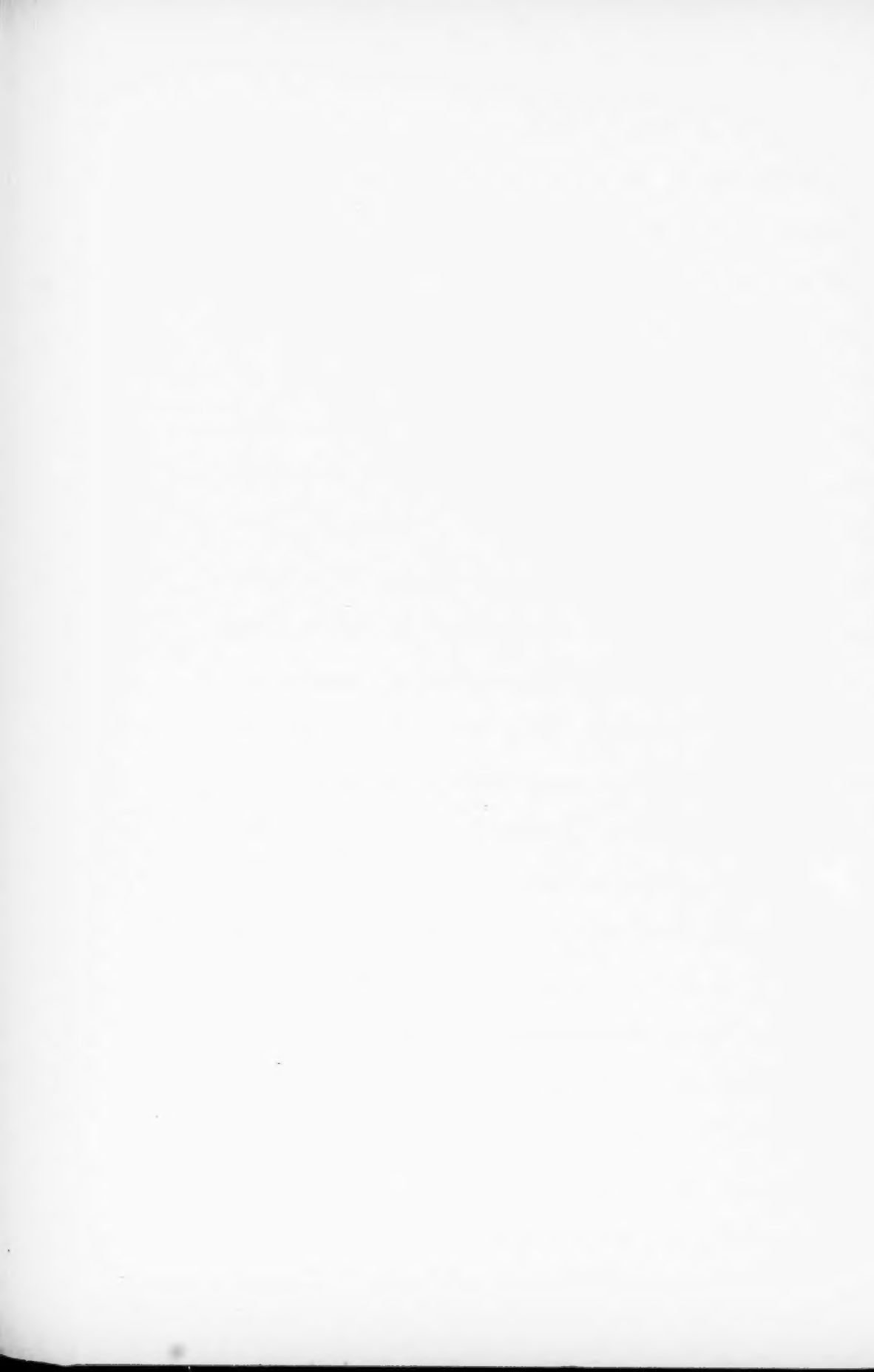


calculated to curb the cascading nationwide drug trade. The majority's result, which by operation of law converts the government-forfeitee into a life-long judgment creditor of the defendant-forfeitor, suspends the ultimate resolution of rights as compelled by the forfeiture pending the death of one of the spouses. While this may be the accommodation that has been achieved at state law between the customary rights of a judgment creditor seeking enforcement of a judgment and the traditional insulation of the entireties estate from the debts of a single spouse, it finds no support in either the federal criminal or civil forfeiture provisions, 21 U.S.C. §§ 853 and 881, and, moreover, is in direct conflict with the congressional commitment to repress the narcotics enterprises that are destroying the moral fiber of the country. The suggested result, in failing to strike a proper balance between an innocent spouse's



interest in jointly owned property and the interest of the government in punishing convicted drug dealers through forfeiture of property acquired or used in the furtherance of their illicit drug initiatives, marks an undesirable evisceration of the congressional declarations underlying the forfeiture laws.

The government argues persuasively that the overwhelmingly coercive policies of criminal and civil forfeitures would be critically eroded if the efficacy of forfeiture orders were made to depend upon disparate state property laws. The majority's disposition - which represents an overweening solicitude for state property law - amounts to a public announcement to criminal defendants that their property will be subjected to a wide disparity of treatment in different states, and that, therefore, the penal consequences of their conduct will vary from jurisdiction to



jurisdiction, despite their violation of federal laws.¹ The better result is to preempt state law with a federal common law of forfeiture whenever, -as here, the property interest of the innocent third party is defined by state law with less than certainty.

In reaching its disposition, the majority relies heavily on the absence of express language in 21 U.S.C. § 853 to support the result urged upon this court by the government. § 853 is admittedly silent as to its application to real property held as an estate in the entirety. On its

1. The majority suggests that the "relation back" provision of the criminal forfeiture statute, 21 U.S.C. § 853(c), by which the government may invalidate a conveyance and compel the forfeiture of property that has been transferred to third parties after "commission of the act giving rise to the forfeiture," obviates any concern for artful planning on the part of drug dealers. The majority's reliance on this provision is misplaced in light of the sophistication of many of these specialized criminals, who are sagacious enough to insulate their property from forfeiture before commission of the act giving rise to the forfeiture.

face, the statute does not clearly direct any of the results variously espoused by either the government or by the appellee. It does not mandate that a forfeiture be vacated upon the petition of an innocent spouse who holds real property with the criminal defendant by the entirety; it does not require that the innocent spouse be completely divested of her interest in real property held in an estate by the entirety; nor, admittedly, does it unequivocally endorse the result suggested herein - partial and *instant* divestiture of the convicted spouse's interest in property held by the entirety as a means of equitably accommodating the interests of both the government and the innocent spouse.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, (1975) (Powell, J., concurring).



In conducting this inquiry, however, "we are not guided by a single sentence [of the statute] or member of the sentence, but look to the provisions of the whole law, and to its object and policy." *Massachusetts v. Morash*, 490 U.S. _____, 109 S.Ct. 1668, 1673, 104 (1989) (emphasis added).

This is not a case where the statute readily provides an answer to the question. Accordingly, the court must look beyond the language of the statute and resort to traditional tools of statutory construction. The majority concededly undertakes a serious effort to interpret the forfeiture statute, but in doing so completely ignores the paramount congressional interest in effectuating a uniform, immediate, certain, harsh and efficacious sanction against those who elect to profit from a venture as pernicious as trading in drugs. In reaching this result, the majority's sole reference point extrinsic to 21 U.S.C. § 853 is the

classical approach to an estate by the entireties as defined by state law. To conclude that this rather arcane and archaic definition of marital property rights, with all of its attendant obstacles (including insulation of the estate from the unilateral debts of one spouse), resolves the issues joined in the instant case with any clarity is to find guidance in the least promising of several sources extraneous to the statute.

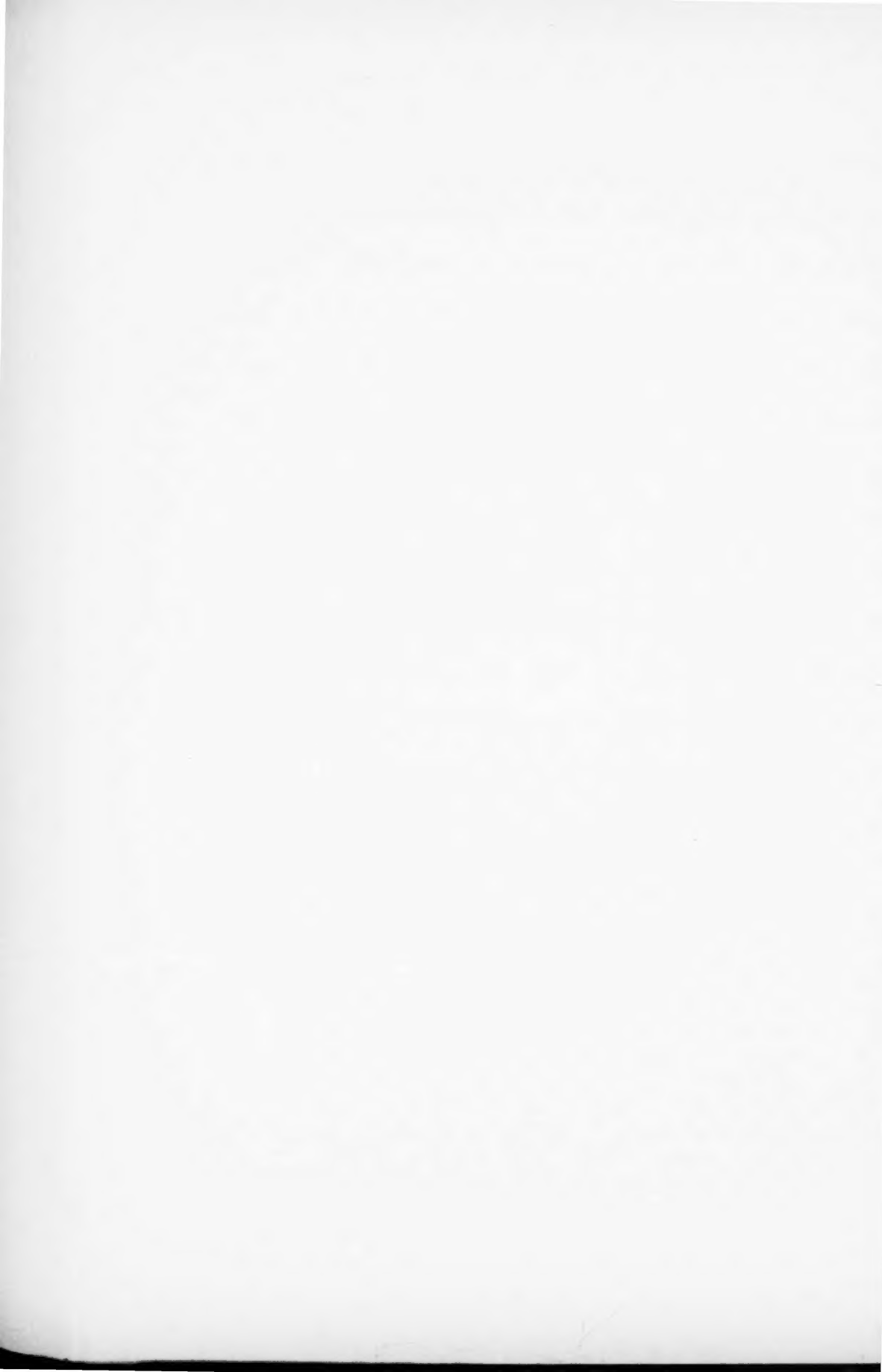
Logic dictates that the most reasonable source of outside guidance inheres in the persuasive policies underlying federal forfeiture schemes.² Where the federal

² Many familiar canons of statutory construction have "long been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text so far as the meaning of words fairly permits so as to carry out in particular cases the general expressed legislative policy." *Securities and Exchange Comm'n v. C.M. Joiner L. Corp.*, 320 U.S. 344, 350-51, 64 S.Ct. 120, 123, cited with approval in *Herman & McLean v. Huddleston*, 459 U.S. 375, 388 n. 23, 103 S.Ct. 683, 690 n. 23 (1983).



policies in favor of a given result are overpowering, and the countervailing state rule of law so imperfectly defined, logic and sound judgment direct the evolution of a federal common law addressing the disposition of forfeited marital property which preempts contrary provisions of the myriad spousal estates recognized in the various states. The Supreme Court has not - as the majority opinion would imply - rendered state domestic property law insusceptible to the traditional principles under which federal law is given preemptive effect:

These principles are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution, provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 633, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962).



Fidelity Federal Savings & Loan Assoc.
v. De La Cuesta, 458 U.S. 141, 153, 102
S.Ct. 3014, 3022, (1981).

21 U.S.C. § 853, by its terms, permits and even invites this approach. In subsection (a) of the enactment, forfeiture is mandated "irrespective of any contrary provision of state law" 21 U.S.C. § 853(a). In subsection (n), however, under which appellee initiated her petition to modify the forfeiture order, the degree to which forfeiture is amended in favor of innocent third parties tacitly relies on the extent of that third party's interest in the property as defined by state law. Herein is created an internal tension, resolution of which is guided by subsection (o), which provides that § 853 be liberally construed so as to accomplish its remedial purposes.³

³ "Remedial purposes," as the term is applied to the entirety of section 853, is an inherently ambiguous phrase. One can perceive numerous "remedial purposes" incorporated into the provisions



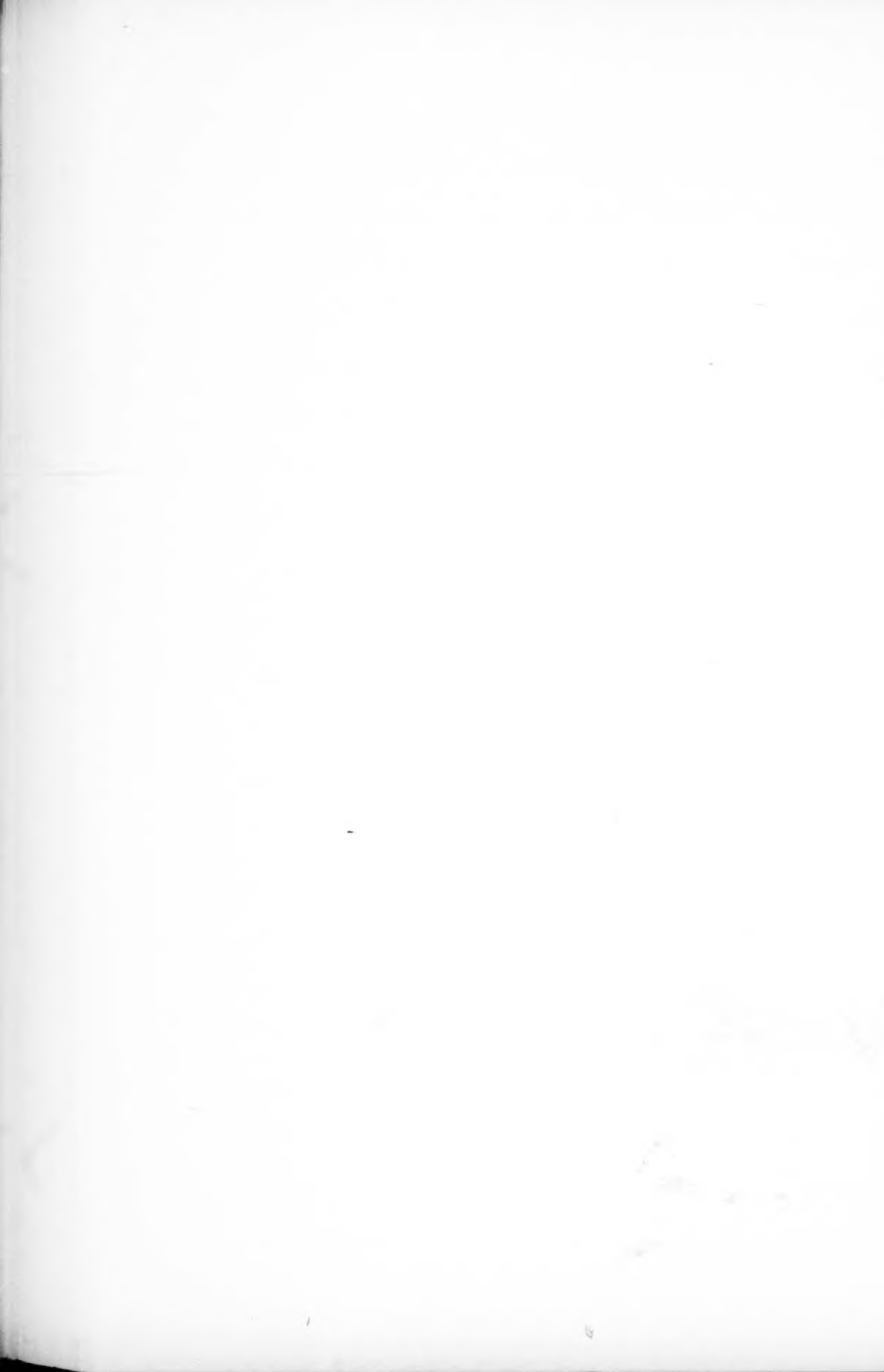
Thus, incorporated into the statute is a common rule of statutory construction: when the plain language is inadequate to resolve a given issue, resort, in the first instance, to a construction that will serve the statute's purposes.⁴ Read in *pari materia*, these three subsections require that: 1) state law define the scope of a

of section 853, not the least of which are subsection (a)'s remedial purpose of deterring crime through threatening drug dealers with loss of their assets, and subsection (n)'s remedial purpose of protecting the interests of innocent third parties.

⁴ The purpose underlying the statute is reflected in its legislative history. The criminal forfeiture provision was part of a bill "designed to enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." 1984 U.S. Code Cong. & Admin. News 3182, 3374. As Judge Greenberg of the Third Circuit recently remarked in his dissent to the court's denial of a petition for rehearing en banc in a case involving the meaning of the "innocent owner" exception to forfeiture, Congress clearly intended "to make forfeiture one of the strongest weapons in the government's arsenal in the war against drug trafficking." *United States v. Property Known as 6109 Grubb Road*, 890 F.2d 659, 663 (3rd Cir. 1989) (Greenberg, Jr., dissenting).



petitioner's interest; 2) state law not undermine the intent and purpose of forfeiture; and 3) any difficulties in construing the various provisions of the statute should be resolved so as to serve its "remedial purposes." These provisions permit reconciliation of the competing interests involved in the instant case in a manner that is not accomplished by the majority's disposition. Federal criminal forfeiture policies demand that defined property of Mitchell Marks, the convicted narcotics dealer, be subject to the sanction of forfeiture. Solicitude for appellee's interests as an innocent spouse counsels against completely divesting her of her interest in the property. The statute, inconsistently perhaps, mandates both that state law not interfere with forfeiture and that state law be consulted to define the rights that must be preserved in third parties. When, as in this case, state law



defines those rights ambiguously, it stands to reason that a preemptive federal common law be developed to define the rights resulting from the guilty spouse's conviction with certainty, immediacy, and some degree of spontaneous penal force.

This may seem harsh, but the compelling nature of these policies and the likelihood and acceptability of severe results has been underscored and approved in two recent decisions of the Supreme Court in which the forfeiture provisions were upheld against constitutional challenges. *United States v. Monsanto*, 109 S.Ct. 2657, (1989), *Caplin & Drysdale, Chtd. v. United States*, 109 S.Ct. 2646 (1989). In the *Monsanto* case the Court rejected the argument that assets which an accused had designated for the retention of legal counsel of his choice were implicitly excepted from the statute's enumeration of forfeitable property. The Court admitted that the plain meaning of the statute could



conceivably result in "harsh" consequences, making it difficult if not impossible for the accused to retain the counsel of his choice - possibly forcing resort to court-appointed counsel - but that the forfeiture statute "mandates" such harsh results. 109 S.Ct. at 2665.⁵

In the companion *Caplin & Drysdale* case, the Court addressed substantially the same issue in constitutional terms, concluding that, under the sixth amendment, a criminal defendant could be deprived of

⁵ This court has not avoided interpreting the criminal forfeiture statute in a manner that produces admittedly "harsh" results. *United States v. Campos*, 859 F.2d 1233, 1238 (6th Cir.1988) ("We recognize that this interpretation of the forfeiture statute [denying unsecured creditors cognizable rights in forfeited property] mandates a harsh result, but it is a result frequently mandated by forfeiture procedures.") emphasis added). Other courts likewise have not been reluctant to visit the hardships of forfeiture on innocent spouses. See, e.g. *United States v. One Parcel of Real Estate*, 715 F.Supp. 355, 356-57, (S.D.Fla.1989), in which the court noted that "[t]he fruits of [the convicted husband's] endeavors were swift but devastating," and that the future rights of the parties were subject to drastic alteration through the "somewhat harsh" operation of the forfeiture statutes.

assets intended for the retention of legal counsel of his choice. In language that affirmed in no uncertain terms the paramount character of the policies underlying the federal forfeiture provisions, the Court concluded "that there is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged to be forfeitable to pay for their defense." 109 S.Ct. at 2655.

Accordingly, I would conclude that absent meaningful language in the statute to the contrary, it was certainly erroneous for the district court in the case at bar to award an innocent spouse a full, unencumbered fee simple interest in the property. Such a gift constitutes a windfall, conferring on the innocent spouse more than she had before her husband exposed the property to forfeiture by engaging in



his illicit drug enterprise. It is equally in error for the panel majority to place the government in the position of a life-long judgement creditor, thus, holding realization of its rights, and of the rights of the spouse, in abeyance pending the demise of one of the parties to the marital relationship. Moreover, the majority places upon the district court not only the burden of formulating a plan for the investment and management of the res over a protracted period of time, but also the time-consuming burden of monitoring the fund in a fiduciary capacity for the balance of the Marks's lives.

In support of its conclusions, the panel majority cites to a footnote in the Eleventh Circuit's recent opinion in *United States v. One Single Family Residence*, 894 F.2d 1511 (11th Cir. 1990), in which that court under circumstances somewhat similar to those presented in the case at bar



conjectured that the government could "file[] a lis pendens against the property" noticing the public of an inchoate, undefinable potential cloud on title to the realty. See *id.* at 1516-17 n. 6. This is a forfeiture in name only, devoid of practical consequence. The forfeiture in *One Single Residence* was nominal because, as the majority fails to note, the decision awarded the entire estate to the innocent spouse, and the reference to the recording of a lis pendens was, in essence, a palliative sop to the government. Specifically, the Eleventh Circuit, invoking convoluted reasoning, concluded that the innocent spouse in an entirety estate stands to losing *nothing* in the wake of the defendant spouse's conviction, because her interest in the estate theoretically extended to the entire property. Conveniently ignoring the very tangible ownership interest of the convicted spouse



(which, too, extended to the entire property), the Eleventh Circuit concluded that "no interest exist in the subject property which can be forfeited to the government" *Id.*, at 1516. The district court in the case at bar, treating the proceeds from the sale of the subject property as a substitute res, arrived at the same conclusion as the Eleventh Circuit in *One Single Family Residence*, yet the majority disposition in the instant case vacates the district court's judgment. Thus, the majority inconsistently expresses approval of the Eleventh Circuit's resolution of the issue confronting this appeal, yet reverses the district court's disposition. Moreover, the Eleventh Circuit's *lis pendens obiter*, as does the majority disposition herein, effectively places a final resolution of the real property rights between the owners of the entireties estate and the government in



abeyance pending divorce or death. It is also relevant to note that the Eleventh Circuit's suggestion that the government record a *lis pendens* constitutes a resolution that is even more indefinite and uncertain than the majority's disposition herein.

The equitable resolution of the uncomfortable conflicts exposed in this case is neither a judgment lien nor a *lis pendens*, but rather a severance of the entirety estate in favor of a flexible tenancy in common between appellee and the government. At once, this solution serves the overriding national need for immediacy, certainty, uniformity, and efficacy in forfeiture, equitably mitigates the pain that appellee must inevitably suffer in the wake of her husband's criminal transgressions, and resolves the matter with the immediacy, certainty, and finality that is to be expected in the wake of a criminal



conviction.

I would, for the reasons expressed herein, reverse the district court and remand the case for final disposition not inconsistent with this opinion.

B. Opinion, Order and Judgment of the United States District Court for the Eastern District of Michigan, Southern Division, entered November 7, 1988.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Nos. 86-CR-80641-DT
87CV-71482-DT

UNITED STATES OF AMERICA,

Plaintiff,

v.

MITCHELL DENNIS MARKS,

Defendant

ORDER

On June 6, 1988, the Defendant, Mitchell Dennis Marks, was convicted by a jury of violating the provisions of 21 U.S.C. 846, which prohibits, *inter alia*, the sale and distribution of cocaine. As part of its verdict, the jury concluded that Marks' interest in an improved parcel of real property at 2525 Leroy Lane, West Bloomfield, Michigan, should be forfeited to



the Government as the instrumentality of an illegal transaction under 21 U.S.C. 853.

On April 17, 1987, the Government initiated a civil action in this District, No. 87-CV-71482-DT, which sought the forfeiture of the Leroy Lane property to the United States. That action was subsequently consolidated with the instant case on August 5, 1988.

The Government and counsel for Leah Liza Marks have now stipulated that she was innocent of any knowledge of the illegal acts of Mitchell Dennis Marks, on the Leroy Lane premises, within the meaning of 21 U.S.C. 881. This stipulation leaves this Court with the necessity to determine the nature and legal effect of Leah Marks' interest, if any, in the subject realty.¹

1. This Court has been advised that the Leroy Lane property has been sold, and the proceeds of the sale have been deposited with the United States Marshals' Service. The Court deems those proceeds to be a substitute res which retains the same legal



I.

Mitchell Dennis Marks and Leah Liza Marks were husband and wife when they jointly purchased the Leroy Lane property under a land contract on November 20, 1975. The couple acquired the property by deed on March 27, 1981. In order to make that acquisition possible, the property was mortgaged to the Federal Mortgage Corporation on May 20, 1981, and the proceeds from that mortgage were used to pay the remaining balance on the land contract.

On May 26, 1981, Federal Mortgage assigned the Marks mortgage to the Consolidated Equipment Company Profit Sharing Plan, George Howell, Trustee. However, when the mortgagees failed to make timely payments, Consolidated Equipment prevailed in a foreclosure proceeding on the

attributes as the realty for purposes of the instant case.

A61

mortgage in Oakland County (Michigan) Circuit Court. The Leroy Lane property was sold on December 2, 1983 pursuant to a Sheriff's Deed.

On June 5, 1984, following the expiration of the redemption period under the judgment of foreclosure, Mitchell and Leah Marks repurchased the property from Consolidated Equipment.

A second judgment of foreclosure, which reflected a default on the June 1984 land contract, was entered in the same state court on February 16, 1988.

II.

A.

The civil and criminal forfeiture proceedings, which are currently pending in this matter, have been consolidated and are being conducted under the docket file of the criminal action. Although the civil forfeiture provisions of 21 U.S.C. 881 and the criminal forfeiture language of 21

U.S.C. 853 are designed to serve somewhat different objectives, these two statutes are to be applied *in pari materia* in order to adjudicate the interests of third parties.

The rights of third parties are subject to the same standard of proof under section 853(n) and section 881(a)(7). That standard requires proof of a third party's defense to forfeitability by a preponderance of the evidence.

Furthermore, each statute contains language which suggests that it is to be applied in conjunction with its counterpart. The civil forfeiture statute, 21 U.S.C. 881, expressly provides that:

the provisions of law relating to
. . . the remission or mitigation
of [judicial] forfeiture . . .
shall apply to . . . forfeitures
incurred . . . under any of the
provisions of this subchapter,
insofar as applicable and not
inconsistent with the provisions
hereof

21 U.S.C. 881(d).

The criminal forfeiture statute, 21

U.S.C. 853, expressly provides for the application of section 881 to a criminal forfeiture proceeding "[e]xcept to the extent that [the two statutes] are inconsistent." 21 U.S.C. 853(j).

In an effort to resolve the instant controversy, this Court will apply the two forfeiture statutes of Title 21 to the instant petition *in pari materia*. As will be explained below, the Court discerns no inconsistency between these statutes, and knows of no legal authority, which would preclude such an application.

B.

Section 881(a)(7) reads as follows:

[N]o property shall be forfeited [as the instrumentality of an offense] to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Section 853(n)(6)(A) states that "the court shall amend the order of forfeiture"

if the petitioner has established by a preponderance of the evidence that:

the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than in the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section . . .

The terms of section 853(n)(6) require the Court to characterize the "legal . . . interest" which the petitioner has in the property.² Since there is no general federal common law, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court applying section 853 has no choice but to employ applicable state law when deciding the

². To the extent that a petitioner's interest in realty is a question of law, the Court cannot apply the command of section 853(n)(6) that the interest be established "by a preponderance of the evidence."



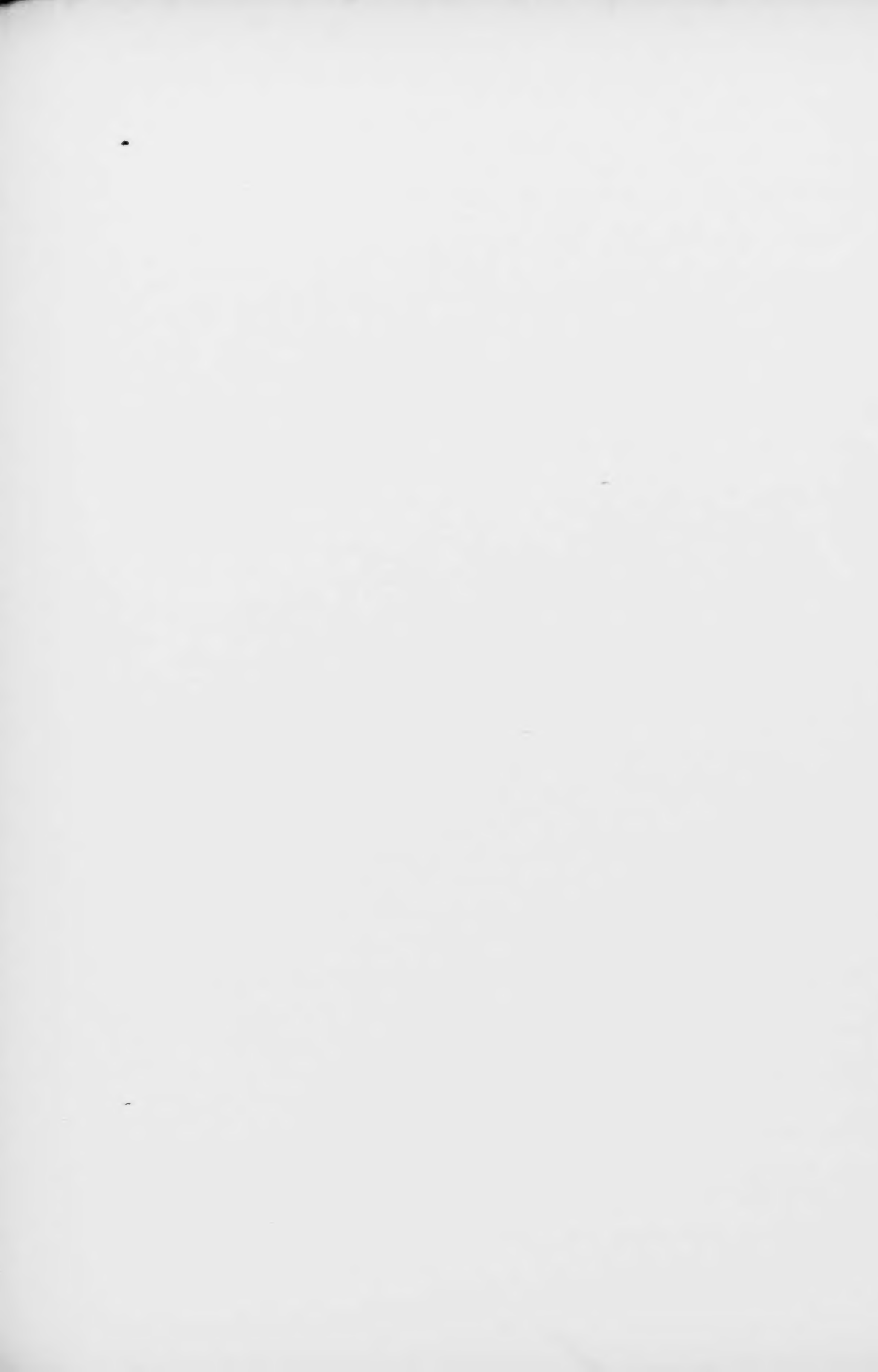
nature of a property interest. *United States v. Yazell*, 382 U.S. 341 (1966).

It is undisputed that at the time of the criminal acts which led to the forfeiture of Mitchell Marks' interest in the property, Mitchell and Leah Marks were tenants by the entirety of the Leroy Lane property under Michigan common law. Stipulation of Facts, paragraph 3. Under Michigan law,

[t]enants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property.

Matter of Grosslight, 757 F.2d 773, 775 (6th cir. 1985), citing *Sanford v. Bertrau*, 204 Mich. 244 (1918). See also *DeYoung v. Mesler*, 373 Mich. 499 (1964); *Hoyt v. Winstanley*, 221 Mich. 515 (1922).

Section 853 requires Leah Marks to



prove that the interest which she asserts in the Leroy Lane property was hers "rather than" the defendant's, or was "superior to" that of the defendant, as of the time of the offense which gave rise to forfeiture. Because Leah Marks' entireties interest is precisely equal to that of her husband under Michigan law, it is not "superior to" his interest. However, because her interest is the equivalent of an undivided life estate in the entire property, and cannot cease to exist because of her husband's actions, *Matter of Grosslight*, 757 F.2d at 775, it is an interest which she possesses, "rather than" her husband, within the meaning of section 853(n)(6)(A).

The Government argues that an offender should not be able to defeat forfeiture merely by holding his real property interests by the entirety. It asserts that any other construction of the federal forfeiture law would frustrate the will of



the Congress to punish criminal offenders by removing the instruments and rewards of their offenses. From this premise, the Government contends that since "[t]he interest of one spouse in an [entireties] estate . . . is not a right to property in any sense," *United States v. Hutcherson*, 188 F.2d 326, 329 (2d Cir. 1951), the forfeiture penalty which was levied upon Mitchell Marks--if it is to have any punitive effect upon the offender--ought to be understood to (1) sever the entireties relationship among the offender, the innocent spouse and the subject realty, and (2) create a joint tenancy between the innocent spouse and the United States, a relationship in which either party could alienate its interest.³

³. The Government does not address certain ramifications of its severance and joint tenancy theory. For instance, it is unclear whether Leah Marks could be compelled to sell her share and give up living in the home if the Government, as her cotenant, chose to sell its interest to a third party for value.

However, these and other potential

However, "[w]hen the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *United States v. U.S. Coin and Currency*, 401 U.S. 715, 720-22 (1971), citing *O. Holmes, The Common Law* 23 M. Howe ed. 1963); *W. Blackstone, Commentaries*, Ch. 8, n.300. Sections 853 and 881 were both originally enacted as part of Title II of the Controlled Substances Act of 1970, Pub. L. 91-513, 84 Stat. 1242 (1970), and were presumably part of the body of forfeiture law to which the *U.S Coin Court* referred.

Federal courts have recognized entirety property to be a fundamental incident of the marital relationship. For instance, entirety property has been

difficulties are obviated because the home in this case has been sold and the proceeds from that sale are easily divisible.



shielded from creditors of the bankruptcy estate of one spouse, *In re Ved Elva*, 260 F. Supp. 978 (1966), and the entireties holdings of tax lien debtors have been held inaccessible to the Government notwithstanding the strong federal policy which favors revenue collections. *United States v. American National Bank of Jacksonville*, 255 F.2d 504, 507 (5th Cir.), cert. denied, 358 U.S. 835 (1958); *Pettengill v. United States*, 205 F.Supp. 10, 13 (D. Vt. 1962).

Most recently, in *United States v. One Single Family Residence*, No. 86-1208-Civ (S.D. Fla. June 30, 1988), a case whose facts closely parallel those of the matter at bar, the Court held that tenancies by the entirety under Florida law were not subject to the Government's civil forfeiture claim against one spouse under 21 U.S.C. 881(a)(7).

This Court agrees with the result



reached in *One Single Family Residence*, and concludes that the Petitioner, Leah Marks, should not be deprived of her entireties interest by severance under the federal forfeiture statutes. To hold otherwise would render the criminal conduct of one spouse sufficient to empower the Government to divest an innocent spouse of his or her lawfully held property.

III.

As the foregoing analysis makes clear, the Court discerns no inconsistency between the limiting words "rather than" and "superior to" in section 853(n)(6)(A), and the limiting words "without . . . knowledge or consent" in section 881(a)(7), as applied to the instant case. As an innocent owner under section 881(a)(7), Leah Marks is entitled to avoid forfeiture to the extent of her interest. As an owner whose asserted interest extends to the entire property, she also fulfills the "rather than" requirement



of section 853 (n)(6).

An application of these statutes *in pari materia* dictates the same result as would a separate application of either statute. Thus, it is clear to this Court that Leah Marks does not forfeit any of her pre-existing interest in the Leroy Lane property. The Government obtains its requested forfeiture relief only to the extent that Mitchell Marks is deprived altogether of his interest in the realty.

Accordingly, the request of the Petitioner, Leah Marks, for relief under 21 U.S.C. 853(n)(6) and 21 U.S.C. 881(a)(7) shall be granted. This Order constitutes a final disposition of Leah Marks' petition in Criminal Action No. 86-CR-80641-DT, and a final judgment in Civil Action No. 87-CV-71482-DT.

IT IS SO ORDERED.

JULIAN ABELE COOK, JR.

United States District Judge

Dated: November 7, 1988.

C. Order Modifying Opinion, Order and Judgment of the United States District Court, Eastern District of Michigan, Southern Division, entered November 22, 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Action No.
87CV-71482-DT

CERTAIN REAL PROPERTY LOCATED
AT 2525 LEROY LANE, WEST
BLOOMFIELD, MICHIGAN,

Defendant.

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Action No.
86-CR-80641-
DT-01

MITCHELL DENNIS MARKS,

Defendant.

IN RE:

LEAH LIZA MARKS,

Claimant.

ORDER MODIFYING ORDER OF JUDGMENT

At a session of said Court, held
in the City of Detroit, County of
Wayne, State of Michigan, on
November 22, 1988.

PRESENT: HONORABLE Julian Abele Cook, Jr.
U.S. District Judge

On November 7, 1988, this Court entered
an Order which granted the relief sought by
LEAH LIZA MARKS and, further, this Court
entered a Judgment in favor of LEAH LIZA
MARKS against the Plaintiff, UNITED STATES
OF AMERICA; it appearing that the Judgment
dated November 7, 1988 may need modifying to
fully afford the relief granted and
otherwise conform with the mandates of 21
USC 853, and the Court being otherwise fully
advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that
this Court's Judgment dated November 7, 1988
be, and is hereby, modified to include the
following additional provisions;

(A) All proceeds of the sale of the



subject property located at 2523 Leroy Lane, West Bloomfield, Michigan, currently being held by the United States Marshall's Service pursuant to Court Order dated April 29, 1988, be delivered to LEAH LIZA MARKS, together with interest thereon as further provided by said Order dated April 29, 1988.

(B) The Judgment of Conviction entered by this Court against MITCHELL DENNIS MARKS on June 6, 1988, In Case No. 86-CR-80641-DT, ordering the forfeiture of his interest of property located at 2525 Leroy Lane, West Bloomfield, Michigan, be, and is hereby, amended so as not to be inconsistent with this Court's Opinion, Order and Judgment dated November 7, 1988, awarding the subject property and/or substitute res to the Claimant, LEAH LIZA MARKS.

IT IS SO ORDERED.

/s/ Julian Abele Cook, Jr.

D. Order of the United States Court of Appeals for the Sixth Circuit Denying Suggestion for Rehearing En Banc and Petition for Rehearing entered October 11, 1990.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 88-2238

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CERTAIN REAL PROPERTY LOCATED AT
2525 LEROY LANE, WEST BLOOMFIELD,
MICHIGAN,

Defendant-Appellee,

MITCHELL DENNIS MARKS,

Defendant-Appellee,

LEAH LIZA MARKS,

Claimant-Appellee,

ORDER

BEFORE: MERRITT, Chief Judge; KRUPANSKY, Circuit Judge; and GRAHAM*, United States District Judge.

*Hon. James L. Graham sitting in by designation from the Southern District of Ohio

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

E. Judgment Pursuant to the Opinion of the United States Court of Appeals for the Sixth Circuit dated October 24, 1990.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 88-2238

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CERTAIN REAL PROPERTY LOCATED AT 2525 LEROY LANE, WEST BLOOMFIELD, MICHIGAN; and
LEAH LIZA MARKS,

Defendants-Appellees.

Before: MERRITT, Chief Judge; KRUPANSKY, Circuit Judge; and GRAHAM, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.



ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby vacated; and the case is remanded for further proceedings consistent with the opinion.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk
/s/ Leonard Green, Clerk

Issued as Mandate: October 24, 1990

(2)
No. 90-1093

Supreme Court U.S.

FILED

MAR 11 1991

In the Supreme Court of the United States
OCTOBER TERM, 1990

LEAH LIZA MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the criminal and civil forfeiture provisions of 21 U.S.C. 853 and 881(a)(7) allow the United States to succeed to the interest of petitioner's former husband in property held by petitioner and her former husband as tenants by the entireties.



TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

<i>Clearfield Trust Co. v. United States</i> , 318 U.S. 363 (1943)	5
<i>United States v. Monsanto</i> , 109 S. Ct. 2662 (1989) ..	9
<i>United States v. One Single Family Residence</i> , 894 F.2d 1511 (11th Cir. 1990)	10, 11

Statutes:

21 U.S.C. 841 (a)	2
21 U.S.C. 846	2
21 U.S.C. 853	3, 5, 9
21 U.S.C. 853 (a)	8, 9
21 U.S.C. 853 (a) (2)	2
21 U.S.C. 853 (c)	8-9
21 U.S.C. 853 (n)	10
21 U.S.C. 853 (n) (2)	3
21 U.S.C. 853 (n) (6) (A)	3, 5
21 U.S.C. 881 (a) (7)	2, 3, 4, 5, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1093

LEAH LIZA MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A57) is reported at 910 F.2d 343. The orders of the district court (Pet. App. A58-A74) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1990, and a petition for rehearing was denied on October 11, 1990. Pet. App. A75-A76. The petition for a writ of certiorari was filed on January 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. On February 26, 1987, petitioner's former husband, Mitchell Dennis Marks, was indicted in the Eastern District of Michigan for conspiracy to possess cocaine with intent to distribute it between December 15 and 17, 1985, in violation of 21 U.S.C. 846, and for possession with intent to distribute cocaine on December 15, 1985, in violation of 21 U.S.C. 841(a). The indictment also contained a forfeiture count pursuant to 21 U.S.C. 853(a)(2), which alleged that Mr. Marks had an interest in real property located at 2525 Leroy Lane, West Bloomfield, Michigan, that he used or intended to use to commit or facilitate the commission of his drug offenses. Mr. Marks was convicted of the drug offenses, and the jury found that he had used or intended to use the Leroy Lane property to facilitate those offenses. On June 6, 1988, he was sentenced to concurrent terms of four years' imprisonment for the conspiracy and substantive drug offenses, to be followed by a three-year term of special parole on the substantive offense. The judgment also declared his interest in the property forfeited to the United States. Pet. App. A2-A3, A58-A59.

On July 15, 1988, petitioner—who was then married to Mr. Marks—filed a petition in the criminal case for a determination of her interest in the real property. In the interim, on April 17, 1987, the Government filed an *in rem* complaint under 21 U.S.C. 881(a)(7) seeking civil forfeiture of the same property. On May 8, 1987, petitioner filed an answer to the civil complaint, and on May 15 she filed a claim of interest in the property in that case as well. The civil and criminal proceedings were consolidated. Pet. App. A3-A4, A59.

b. The criminal forfeiture provisions of 21 U.S.C. 853 provide in relevant part:

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

* * * * *

(2) any of the person's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of, such violation * * * .

Where an order of criminal forfeiture has been entered under Section 853, a third party asserting a legal interest in the property, such as petitioner, may petition the court for a hearing to adjudicate her interest. 21 U.S.C. 853(n)(2). The court then must amend the order of forfeiture under 21 U.S.C. 853(n)(6)(A) if the third-party petitioner establishes by a preponderance of the evidence that she—

has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant * * * at the time of the commission of the acts which gave rise to the forfeiture of the property * * *

The relevant section of the civil forfeiture statute, 21 U.S.C. 881(a)(7), provides for forfeiture to the United States of “[a]ll real property, including any right, title, and interest * * * in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the com-

mission of," a drug felony. Section 881(a)(7) further provides, however, that—

no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

c. In the consolidated proceedings before the district court, the parties stipulated that the Leroy Lane property was owned at the time of the offenses by Mitchell Marks and petitioner, then husband and wife, as tenants by the entireties, and that petitioner was innocent of any knowledge of Mr. Marks' illegal activities on the premises. By an agreement of the parties dated April 29, 1988, the property was sold and the net proceeds were deposited with the United States Marshal. The district court deemed the proceeds to be a substitute *res* having the same attributes as the real property for purposes of these forfeiture proceedings. Pet. App. A4, A50 & n.1.¹

By orders dated November 7 and 22, 1988, the district court entered judgment for petitioner in the civil forfeiture case and modified the order of forfeiture in petitioner's favor in the criminal case. Pet. App. A58-A74. The court awarded petitioner the entire proceeds of the sale of the Leroy Lane property, holding that no part of the property could be

¹ The couple purchased the property under a land contract on November 20, 1975. When they failed to make timely payments, the mortgagor successfully brought foreclosure proceedings and the property was sold on December 2, 1983, pursuant to a sheriff's deed. After expiration of the redemption period, the couple repurchased the property in June 1984. The couple then defaulted on the second land contract, and a second judgment of foreclosure was entered against them in state court on February 16, 1988. Pet. App. A60-A61.

forfeited to the United States. The court reasoned that because petitioner had a legal interest in the property that is “the equivalent of an undivided life estate in the entire property” and that “cannot cease to exist because of her husband’s actions,” she “rather than” her husband had an interest in the entire property within the meaning of Section 853(n)(6)(A). Pet. App. A66. On this basis, the court held that the entire property, including Mr. Marks’ interest, was insulated from criminal forfeiture to the United States. *Id.* at A66-A67, A69, A74. For similar reasons, the court held that the entire property was insulated from civil forfeiture under the “innocent owner” exception in 21 U.S.C. 881(a)(7). Pet. A70-A71, A73-A74.

4. a. The United States appealed, and the court of appeals vacated and remanded. Pet. App. A1-A57. The government argued that where, as here, property is held as tenants by the entireties and the interest of one spouse is subject to forfeiture under 21 U.S.C. 853 or 881(a)(7), the government is immediately entitled to realize a one-half interest in the property. Relying on *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the government urged that a federal common law rule be developed to effectuate the purposes of the federal forfeiture statutes in such circumstances. That federal common law rule would supersede the tenancy by the entireties (under which each spouse has an undivided interest in the entire property with a right of survivorship and neither spouse can alienate his or her interest) and would effectively transform the estate into a tenancy in common between the innocent spouse and the United States (as successor to the interest of the spouse who committed the offense). The United States then would be entitled to obtain an immediate partition or

sale of the property and to receive one-half of the proceeds, and the innocent spouse would not have a right of survivorship if the offending spouse died first.

The court of appeals rejected the government's contention, concluding that the text and purposes of the federal forfeiture statutes do not require displacement of state property law. Pet. App. A11-A28. The court reasoned that "[p]roperty interests have long been acquired and defined by state law," and that "it was with those interests in mind that Congress drafted provisions for the protection of innocent third parties." *Id.* at A17-A18. In this case, the court believed, "[t]o sever the entireties estate in favor of a tenancy in common among [petitioner] and the Government would not merely prevent a windfall to [petitioner], * * * but would vest the Government with a greater interest than that held by the individual wrongdoer whose interest the Government has acquired and would not adequately compensate [petitioner] for her survivorship interest." *Id.* at A28. The court therefore held that petitioner retained her interest in the tenancy by the entireties as it existed under state law when her husband committed the acts giving rise to forfeiture under federal law. *Id.* at A22, A28.

At the same time, however, the court disagreed with the district court's conclusions that petitioner's interest in the property prevented forfeiture to the United States of her husband's corresponding interest, and that the entire property vested in petitioner by reason of the forfeiture. Pet. App. A28-A39. Instead, the court held that the United States succeeded under the federal forfeiture statutes to Mr. Marks' interest in the property, but that forfeiture did not defeat petitioner's right to enjoy the essential attributes of the interest she retained. As a result, the

court explained, the government is precluded from actually realizing Mr. Marks' interest in the property "unless and until [petitioner] predeceases her husband or the entirety estate is otherwise terminated by dissolution of the marriage or joint conveyance." *Id.* at A31.

The court of appeals remanded the case to allow the district court to accommodate the respective interests of petitioner and the United States under the principles it announced. Pet. App. A32, A35, A38. It observed that if the Leroy Lane property had not been sold, petitioner would have been entitled to live in the house for the duration of the tenancy by the entirety, "since the estate is founded on marital union, and the government obviously cannot assume the role of spouse to [petitioner]." *Id.* at A31-A32. Rather, the Government would have had a lien on the property to the extent of Mr. Marks' interest, to prevent petitioner from obtaining the entire proceeds if the property was sold. *Id.* at A32. But because the real property here had been sold, the district court would have to determine on remand how to protect the government's interest in the fund while allowing petitioner to benefit from it, and to protect each party's right of survivorship in the event that either petitioner or Mr. Marks died. *Id.* at A32, A36-A37.²

3. The government informed the court of appeals in response to petitioner's petition for rehearing and suggestion of rehearing en banc (at 2 n.1) that petitioner's counsel had notified the government that pe-

² Judge Krupansky dissented from the majority's holding that the government is not entitled to realize its interest in the property immediately, under a federal common law rule. Pet. App. A39-A57.

tioner and Mitchell Marks are now divorced, thereby terminating the tenancy by the entirety under Michigan law.

ARGUMENT

1. The court of appeals rejected the government's contention that, by operation of a federal common law rule derived from the purposes of the forfeiture statutes, the tenancy by the entirety under state law was dissolved upon Mr. Marks' commission of the acts giving rise to forfeiture of the property, and that the United States therefore was entitled to immediate satisfaction of its interest in the property. Instead, the court held that the United States succeeded only to whatever interest Mr. Marks had in the property under state law, while preserving petitioner's corresponding interest—including the attributes of a tenancy by the entirety that would protect her continued enjoyment of the property and her right of survivorship. The United States has not sought review of that holding in this Court.

2. Not content with retaining whatever interest she previously had under state law, petitioner argues (Pet. 9-33) that her husband's interest in the property was also insulated from forfeiture to the United States—and, what is more, that her husband's interest became vested in *her* when he committed the drug offenses, as the district court held. The court of appeals correctly rejected that contention.

The criminal forfeiture statute states that “irrespective of any provision of State law,” a convicted defendant shall forfeit to the United States “any” of his property that was used to commit or facilitate commission of the drug offenses. 21 U.S.C. 853(a). Section 853(a) further states that the court “shall order” forfeiture of “all” such property, and 21

U.S.C. 853(c) states that “[a]ll right, title, and interest” in such property “vests in the United States upon commission of the act giving rise to forfeiture.” In holding in *United States v. Monsanto*, 109 S. Ct. 2662 (1989), that property the defendant wants to use to pay an attorney is not exempt from forfeiture under this provision, the Court observed that “Congress could not have chosen * * * broader words to define the scope of what was to be forfeited,” and that the concept of “property” for these purposes is “all-inclusive.” *Id.* at 2662. The same reasoning applies here. Nothing in the all-inclusive statutory text suggests that a defendant’s interest in property held as tenants by the entirety under state law is exempted from forfeiture. To the contrary, Section 853(a)’s mandate that property be forfeited “irrespective of any provision of State law” forecloses any argument that the particular features of a tenancy by the entirety under state law insulate such property from forfeiture.

The civil forfeiture statute, 21 U.S.C. 881(a)(7), is comparably all-inclusive in its scope, providing for forfeiture of “*all* real property” used to commit or facilitate a drug felony, specifically including “*any* right, title, and interest * * * in the whole of any lot or tract of land and *any* appurtenances or improvements” (emphasis added). Once again, there is no suggestion that real property (or any “interest” in real property) is exempt from forfeiture under federal law simply because it takes the form of a tenancy by the entirety under state law.

Nor is there any basis for petitioner’s even more improbable contention that the effect of Sections 853 and 881(a)(7) in the context of a tenancy by the entirety is not only to insulate the interest of the guilty spouse from forfeiture to the United States,

but also to transfer the guilty spouse's interest to the innocent spouse. That result would undermine the purposes of the federal forfeiture statutes. It also would conflict with petitioner's repeated contention (Pet. 10, 13, 16-18, 19-22, 25-29) that the federal forfeiture laws should be construed and applied in a manner that respects state law, since by vesting all interests in the innocent spouse, the entireties estate would be terminated in the same manner as if the guilty spouse had died. The third-party relief provisions in 21 U.S.C. 853(n) and 881(a)(7) do not support that outcome. Those provisions protect only whatever interest the innocent third-party claimant had prior to the forfeiture; they do not confer new interests on the claimant, in derogation of the rights vested in the United States upon the commission of the act giving rise to forfeiture.³

Contrary to petitioner's contention (Pet. 9, 12-16), there is no conflict between the Sixth Circuit's decision in this case and the Eleventh Circuit's decision in *United States v. One Single Family Residence*, 894 F.2d 1511 (1990), that warrants review by this

³ Petitioner argues (Pet. 21-22, 24-26) that under Michigan law, there is no legal form of "lien" or "lis pendens" comparable to the interest granted the government by the court of appeals. As we read the decision below, however, the court of appeals did not hold that the United States had actually obtained a "lien" or "lis pendens" that is either derived from state law or dependent upon the availability of a similar interest or mechanism under state law. The court used those terms by way of analogy, to explain that the interests of the United States would be fully protected while the property was held in a tenancy by the entireties. See Pet. App. A33-A37. Whatever characterization is used, the right of the United States to perfect the interest it has acquired by forfeiture, should the tenancy by the entireties be terminated in the future, derives from the federal forfeiture statutes themselves.

Court. The Eleventh Circuit, like the court below, held that the property interest of the innocent spouse in a tenancy by the entirety must be protected to the full extent it is recognized under state law. *Id.* at 1516. And like the court below, it rejected the government's argument that, by operation of a federal common law rule, the tenancy by the entirety should be automatically transformed into a tenancy in common. As a consequence, the Eleventh Circuit held that the United States was not then entitled to a judgment of forfeiture.

In a significant footnote, however, the Eleventh Circuit preserved the possibility that the United States might "execute or levy on its interest should the entirety estate be altered by changes in circumstances or by court order," and it "[did] not rule out the possibility that if the United States filed a *lis pendens* against the property, the government might acquire in a later forfeiture proceeding [the criminal offender's] interest in the property should he divorce his spouse, should [she] predecease him, or should their interests be transmuted into some divisible form by their actions or by law." 894 F.2d at 1516-1517 n. 6. The Sixth Circuit in this case discussed this footnote in explaining why its reasoning was not inconsistent with that of the Eleventh Circuit in *One Single Family Residence*. See Pet. App. A32-A35.⁴

⁴ The court below also stated: "The distinguishing feature in the case before the Eleventh Circuit is that the real property in question had not been sold, and therefore whatever future interest the Government might have in the property would be protected by the filing of a *lis pendens*. [H]ere, however, the real property has been converted to a fund of money which could easily be dissipated. Therefore, it becomes necessary in this case to hold the money in escrow, establish-

As it happens, because petitioner is now divorced from Mitchell Marks, the proceeds of the sale of the Leroy Lane property are now held in a tenancy in common. There accordingly is no impediment to the forfeiture of Mr. Marks' interest to the United States and division of the proceeds between petitioner and the United States. This is precisely the situation contemplated by the footnote in *One Single Family Residence*. Although the mechanics by which the Sixth and Eleventh Circuits have suggested that the respective interests of the United States and the innocent spouse may be accommodated and protected might differ somewhat, the practical effect of their approaches is the same. Review by this Court therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

MARCH 1991

ing in effect a lis pendens in order to protect the Government's interests in anticipation of the occurrence of some event which may result in the vesting of the Government's interest in the proceeds of the property." Pet. App. A34-A35.